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ARTICLES

The Ballad of Transborder Arbitration

THOMAS E. CARBONNEAU*

INTRODUCTION

International commercial arbitration (ICA) is many things positive. Because business transactions cannot take place without a functional system of adjudication, ICA has enabled parties to engage in and pursue international commerce.¹ As a result, it has had an enormous impact upon the international practice of law,² the structuring of a *de facto* international legal system,³ and the development of a substantive world

* Moise S. Steeg, Jr. Professor of Law, Tulane University, and Editor-in-Chief, *World Arbitration and Mediation Report*. © Thomas E. Carbonneau. All Rights Reserved. Professor Carbonneau has recently been appointed to the law faculty at the Pennsylvania State University-Dickinson School of Law. The footnotes that follow are, in the main, selected bibliographic references. In constructing these references, I relied upon the remarkable industry of Vrat Pechota in HANS SMIT AND VRATISLAV PECHOTA, *COMMERCIAL ARBITRATION – AN INTERNATIONAL BIBLIOGRAPHY* (2d ed. 2001). It is an outstanding work of enormous value. I hereby acknowledge my indebtedness to that reference work.

1. See, e.g., THOMAS E. CARBONNEAU, *CASES AND MATERIALS ON THE LAW AND PRACTICE OF ARBITRATION* 647-49 (2d ed. 2000) [hereinafter CARBONNEAU, *LAW AND PRACTICE*]; Grigera Naón, *The Role of International Commercial Arbitration*, 65 *ARBITRATION* 266 (1999); Howard M. Holtzmann, *Arbitration: An Indispensable Aid to Multinational Enterprises*, 10 *J. INT'L L. & ECON.* 337 (1975).

2. Many multinational law firms have large departments that specialize in international litigation through arbitration. The leading firms appear to be Freshfields, Clifford Chance, and White & Case.

3. There is no officially-recognized entity invested with political and jurisdictional authority from a sovereign nation-state. Nonetheless, due to a variety of factors discussed in detail later in the article (see text at notes 9-10 *infra*), the process of transborder arbitration functions as if it were a state-sanctioned adjudicatory process. See Henry P. de Vries, *International Commercial Arbitration: A Contractual Substitute for National Courts*, 57 *TUL. L. REV.* 42 (1982); see also Soia Mentschikoff, *Commercial Arbitration*, 61 *COLUM. L. REV.* 846 (1961); Bruno Oppetit, *Philosophie de l'Arbitrage Commercial International*, 120 *J. DU DROIT INT'L (CLUNET)* 811 (1993).

law of commerce.⁴ In a word, ICA has been a vital engine in the creation of a transborder rule of law.⁵ Furthering this design, the arbitral "method" has even been applied to the unruly political problems that attend international trade and the implementation of international trade policy.⁶

Despite its service to the wealth-creating ambition of the international business community, ICA represents an idealistic experiment in transborder understanding and cooperation.⁷ The architects of the process faced head-on the challenge of diversity. They confronted a wide variety of cultural, historical, religious, national, regional, economic, and political dispositions in erecting the process. Initially, as with any venture in transnational cooperation, optimism reigns and the horizons are limitless. As actual discussions ensue, the idealistic embers die down, and the proponents of harmony become increasingly unwilling to surrender advantage. The veneer of universal understanding begins to yield to the uglier and more obdurate reality of self-interest. The founders of ICA, therefore, engaged in and demonstrated an abundance of creativity, ingenuity, and resourcefulness of a technical, legal, and political kind in order to establish a workable process of adjudication that spanned the range of international commercial disagreements and the breadth of world laws and legal cultures.⁸ A bold and steadfast yet tolerant intelligence needed to prevail at every stage of elaboration.

Sovereign state cooperation was indispensable to instituting the process.⁹ ICA needed the approbation of states to benefit from munici-

4. See generally THOMAS E. CARBONNEAU, *LEX MERCATORIA AND ARBITRATION: A DISCUSSION OF THE NEW LAW MERCHANT* (rev. ed. 1998) [hereinafter T. CARBONNEAU, *LEX MERCATORIA AND ARBITRATION*]. See also Bernardo M. Cremades, *The Impact of International Arbitration on the Development of Business Law*, 31 AM. J. COMP. L. 526 (1983); Jan Paulsson, *La Lex Mercatoria dans l'Arbitrage C.C.I.*, 1990 REVUE DE L'ARBITRAGE 55.

5. See FOUCHARD, GAILLARD, & GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION (Emmanuel Gaillard & John Savage eds., 1999); RENE DAVID, *ARBITRATION IN INTERNATIONAL TRADE* (1985); see also Charles N. Brower, *The Global Court: The Internationalization of Commercial Arbitration*, 26 U. BALT. L. REV. 9 (1997). Accord Philip J. McConaughay, *The Risks and Virtues of Lawlessness: A "Second Look" at International Commercial Arbitration*, 93 NW. U. L. REV. 453 (1999).

6. See, e.g., COMMERCIAL MEDIATION AND ARBITRATION IN THE NAFTA COUNTRIES (LUIS MIGUEL DIAZ & NANCY ORETSKIN eds., 1999); R. Edward Ishmael, Jr., *North American Free Trade Agreement: Dispute Resolution Procedures*, 2 AM. REV. INT'L ARB. 455 (1991).

7. See, e.g., Geoffrey M. Beresford Hartwell, *Arbitration: The Commercial Way to Justice?*, 15 B.U. INT'L L.J. 179 (1997).

8. See CONFLICTING LEGAL CULTURES IN COMMERCIAL ARBITRATION: OLD ISSUES AND NEW TRENDS (Stefan N. Frommel & Barry A. K. Rider eds., 1999); Christian Borris, *Common Law and Civil Law: Fundamental Differences and Their Impact on Arbitration*, 60 ARBITRATION 78 (1994); Michel Gaudet, *Overcoming Regional Differences*, 5 J. INT'L ARB. 67 (1988).

9. See William Lane, *The Role of the Legislature and the Courts in the Development of the Arbitration Process*, 52 ARBITRATION 195 (1986); Riccardo Luzzatto, *International Commercial Arbitration and the Municipal Law of States*, 157 RECUEIL DES COURS 9 (1977); George K.

pal courts' status of legitimacy and their authority in order to function effectively as a transborder system. State approval was facilitated by the fact that the political or human rights of individual citizens were not directly implicated by the development of a private transborder system of adjudication—although the state's power to regulate commercial conduct was at play, might have to be delegated in whole or in part to arbitrators, and could eventually be substantially eroded. State affirmation of ICA, however, was necessary to the transborder pursuit of business, the integrity and execution of international commercial contracts, and the proper operation of regional trade.

States needed to be persuaded to delegate the public function of adjudication to a group of private actors and to the anonymous forces of the marketplace. Moreover, the delegation of sovereign authority had to be unequivocal and unqualified. Once undertaken, the deregulation of transborder adjudication could not be altered or abandoned. It needed to be continuous to avoid profound disruptions of commerce and the marketplace. Moreover, after it had been conferred, state approval needed to become self-effacing. The transborder arbitral process had to operate on its own and serve exclusively commercial objectives. In addition, a variety of professionals—ranging from judges and lawyers to prospective arbitrators and the commercial users of the process—needed to become unflinchingly loyal to a private system of adjudication to which they owed neither political nor social allegiance. Finally, a synthesis of highly disparate national approaches to law and legal adjudication needed to be achieved in order to make the process work. A comparative law analysis of enormous proportions was instrumental to the process.¹⁰

In matters of trial procedure, for example, it is well-settled that the United States adversarial, party-driven model of trial differs greatly from its civilian, judge-centered counterpart.¹¹ In fact, the opposition can be so radical on some matters that just results reached under one system are deemed illegal in the other. Therefore, would the envisaged transborder arbitral proceedings include pretrial discovery and cross-examination or *l'expertise judiciaire* and *le contradictoire*? Divergences in national substantive law also needed to be accommodated. For instance, would a party reference to "the basic law of contract" include the doctrine of

Walker, *Trends in State Legislation Governing International Arbitrations*, 17 N.C. J. INT'L L. & COM. REG. 419 (1992); see also J. Stewart McClendon, *State International Arbitration Laws: Are They Needed or Desirable?*, 1 AM. REV. INT'L ARB. 245 (1990).

10. See *supra* note 8 and accompanying text.

11. On the basic differences between these systems in terms both of procedure and substance, see HENRY P. DE VRIES, *CIVIL LAW AND THE ANGLO-AMERICAN LAWYER* (1976); H. PATRICK GLENN, *LEGAL TRADITIONS OF THE WORLD: SUSTAINABLE DIVERSITY IN LAW* (2000).

mitigation of damages, the good faith obligation, and clear rules on the passing of title? National laws contain variegated positions on these issues. Which version of the law should prevail? Would party choice always govern the resolution of such conflicts? Was party choice a sufficient basis for decision? Should it always provide the final word in commercial litigation? Also, in a more technical sense, would a contractual reference to a law of arbitration—in addition to the reference to a law to govern the merits—create a concurrent governing law? If so, how would the dual designation operate? Would the law of arbitration dislodge the other law and be controlling or would it act as a default mechanism—in all or some circumstances? What if the reference to the law of arbitration was the only party designation? Would the substantive law of that jurisdiction apply to the merits? Why? Why not?

Many of the challenges that arose from the diversity of national law were successfully addressed within the process. A large number of states endorsed ICA,¹² thereby shielding international arbitral agreements and awards from national divergences and opposition. Currently, more than 130 states¹³ have ratified the New York Arbitration Convention.¹⁴ The presumption of the enforceability of awards under the Convention generally is respected and applied by the national courts of the ratifying states. National court judges seem to have understood well the lesson that the enforcement of arbitral awards is essential to the viability of ICA, which, in turn, makes national participation in international business possible. Moreover, the elaboration of a model arbitration law and rules through the UNCITRAL framework¹⁵ attests to the greater civiliza-

12. See, e.g., Charles L. Evans & Robert W. Ellis, *International Commercial Arbitration: A Comparison of Legal Regimes*, 8 TEX. INT'L L.J. 17 (1973); Bruno Oppetit, *Les Etats et l'Arbitrage International: Esquisse de Systématisation*, 1985 REV. ARB. 493; Alain Plantey, *Introduction to International Arbitration*, 1 ICC INT'L CT. ARB. BULL. 12 (1990); see also Richard M. Mosk, *International Arbitration*, 10 WHITTIER L. REV. 195 (1988).

13. See, e.g., CARBONNEAU, LAW AND PRACTICE, *supra* note 1, at 707.

14. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *opened for signature* June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 (*codified in* 9 U.S.C.A. §§ 201-208 (1970)) [hereinafter the New York Arbitration Convention]. The literature on the New York Arbitration Convention is voluminous. See, e.g., HANS SMIT & VRATISLAV PECHOTA, COMMERCIAL ARBITRATION—AN INTERNATIONAL BIBLIOGRAPHY 29-39 (2001) [hereinafter SMIT & PECHOTA, BIBLIOGRAPHY]. The basic references and critical texts include: THE NEW YORK CONVENTION (Giorgio Gaja ed., 1980); ALBERT JAN VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958 (1981). See also UNITED NATIONS, ENFORCING ARBITRATION AWARDS UNDER THE NEW YORK CONVENTION: EXPERIENCE AND PROSPECTS (1999); ALBERT JAN VAN DEN BERG, IMPROVING THE EFFICIENCY OF ARBITRATION AGREEMENTS AND AWARDS: 40 YEARS OF APPLICATION OF THE NEW YORK CONVENTION (1999). Recent articles include: Alan Scott Rau, *The New York Convention in American Courts*, 7 AM. REV. INT'L ARB. 213 (1996); David P. Stewart, *National Enforcement of Arbitral Awards Under Treaties and Conventions*, in INTERNATIONAL ARBITRATION IN THE 21ST CENTURY: TOWARDS 'JUDICIALIZATION' AND UNIFORMITY? 163 (Richard B. Lillich & Charles N. Brower eds., 1994).

15. See SMIT & PECHOTA, BIBLIOGRAPHY, *supra* note 14, at 58-66; see also Aron Broches,

tion of the process. A basic consensus exists as to the applicable regulatory predicate and acceptable hearing procedures. Finally, there are strong indications that arbitral awards are creating a substantive trans-border law of commerce that is likely to be controlling in most arbitrations.¹⁶

A BRIEF HISTORY

In its contemporary embodiment,¹⁷ ICA emerged soon after the Second World War—more than likely, as part of Western efforts to export the virtues of capitalism and to maintain the unity and develop the prosperity of the free world alliance. This initial phase of ICA's development was restrained—due, in all likelihood, to the restrictions that accompanied the cold war ideology. Because of East-West distrust and competition, worldwide, unfettered commercial exchanges were not possible. Ideological enclaves impeded the development of a uniform position on international trade. Moreover, military and other dictatorships in Latin America contributed to regional instability and thwarted the growth of national economies. Communist political parties within Western European countries gave rise to statist social democracies, demonstrating that capitalism was not assured a victory even among former war allies. Finally, the key components of the Asian region had been devastated by the war, subsequent conflicts, and the battles for ideological primacy.

Eastern European countries took an internally unified position on trade, but their insularity hardly gave the policy a larger credibility or

The 1985 UNCITRAL Model Law on International Commercial Arbitration: An Exercise in International Legislation, 18 NETH. Y.B. INT'L L. 3 (1987); Gerald Herrmann, *The UNCITRAL Arbitration Law—Its Background, Salient Features, and Purposes*, 1 ARB. INT'L 6 and 81 (1985); Gerald Herrmann, *The UNCITRAL Arbitration Law: A Good Model of a Model Law*, 3 UNIFORM L. REV. 483 (1998); Vratislav Pechota, *The Future of the Law Governing the International Arbitral Process: Unification and Beyond*, in T. CARBONNEAU, *LEX MERCATORIA AND ARBITRATION*, *supra* note 4, at 257. See generally ISAAK DORE, *ARBITRATION AND CONCILIATION UNDER THE UNCITRAL RULES: A TEXTUAL ANALYSIS* (1986); ISAAK DORE, *THE UNCITRAL FRAMEWORK FOR ARBITRATION IN CONTEMPORARY PERSPECTIVE* (1993); HOWARD HOLTZMANN & JOSEPH NEUHAUS, *A GUIDE TO THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION: LEGISLATIVE HISTORY AND COMMENTARY* (1989).

16. See FILIP DE LY, *INTERNATIONAL BUSINESS LAW AND LEX MERCATORIA* (1992); see also *supra* note 4 and accompanying text; SMIT & PECHOTA, *BIBLIOGRAPHY*, *supra* note 14, at 325-28. But see Georges S. Delaume, *The Myth of the Lex Mercatoria and State Contracts*, in T. CARBONNEAU, *LEX MERCATORIA AND ARBITRATION*, *supra* note 4, at 111.

17. See generally IAN R. MACNEIL, *AMERICAN ARBITRATION LAW: REFORMATION - NATIONALIZATION - INTERNATIONALIZATION* (1992); Sir Michael J. Mustil, *Arbitration: History and Background*, 6 J. INT'L ARB. 43 (1989); Allan Philip, *A Century of Internationalization of International Arbitration: An Overview*, in *THE INTERNATIONALISATION OF INTERNATIONAL ARBITRATION* 25 (Martin Hunter et al. eds., 1995).

scope.¹⁸ The Soviet bloc conducted trade among its members and devised bureaucratic entities, known as trade commissions, to regulate commerce within the bloc and to provide a framework for the resolution of transactional disputes.¹⁹ The trade commissions created arbitral systems by which to implement dispute resolution. This arbitral process was of narrow application and was subservient to the political ideology of the bloc. Its purpose was to facilitate the achievement of statist policies, not to foster competition among free market forces.

Two events brought about a second, more advanced phase in the development of ICA: (1) the collapse of the Soviet Union and the end of the cold war (symbolized by the fall of the Berlin Wall in 1989); and (2) the eventual realization among leading international lawyers on Wall Street that transborder arbitration was a force to be reckoned with in international commerce.²⁰ In fact, ICA had already begun to replace domestic courts as the primary mechanism by which to address the problems that attended the implementation of international contracts. At this stage in its evolution, ICA was also bolstered by the advent of "globalization," a reinvigorated form of international commerce done on a truly worldwide basis. The pursuit of self-interest through economic consensus and pragmatic cooperation took the place of the more destructive competition for ideological spheres of influence in the world community. In the 1990s, in fact, commerce replaced politics as the primary

18. See generally WILLIAM E. BUTLER, *ARBITRATION IN THE SOVIET UNION* (1989); J. JAKUBOWSKI, *PERMANENT ARBITRATION COURTS FOR FOREIGN TRADE IN POLAND* (1962); J. Cuth, *The Arbitration Court of the Czechoslovakia Chamber of Commerce and Industry*, 21 BULL. CZECH. L. 94 (1982); Svetozar Hanak, *The Experience of Socialist Lawyers in Arbitration Held in Non-Socialist Countries on Litigations Between Businessmen from East and West*, 10 INT'L BUS. LAW. 145 (1982); Kaj Hobér, *Arbitration in Moscow*, 3 ARB. INT'L 119 (1987); Simone Marie Klechner, *Foreign Trade Arbitration in Romania*, 5 N.Y.U. J. INT'L L. & POL. 233 (1972); Kalman Leloczky, *East-West Arbitration: A Practitioner's Viewpoint from Hungary*, 4 ARB. INT'L 266 (1988); Vladimir Orlov, *Arbitration Procedure in East-West Trade*, 55 NORDIC J. INT'L L. 310 (1986); Vratislav Pechota, *International Economic Arbitration in the USSR and Eastern Europe*, 8 N.Y.L. SCH. J. INT'L & COMP. L. 377 (1987); Hilmar Raeschka-Kessler, *Arbitration in the Changed East-West Relationship*, 21 INT'L BUS. LAW. 15 (1993); Frode Ringdal, *Special Features of International Arbitration in Norway*, 49 ARBITRATION 91 (1983); Heinz Strohbach, *Arbitration in Berlin*, 8 ARB. INT'L 185 (1992); Heinz Strohbach, *Arbitration in Berlin Three Years After the Watershed*, 8 INT'L ARB. REP. 12 (1993); Heinz Strohbach, *German Democratic Republic: The Arbitration Court Attached to the Chamber of Foreign Trade*, in HANDBOOK OF INSTITUTIONAL ARBITRATION IN INTERNATIONAL TRADE 59 (E. Cohn et al. eds., 1977); Robert B. von Mehren, *Arbitration in Central and Eastern Europe: A Practitioner's View*, 47 ARB. J. 38 (1992); Jaroslav Zourek, *New Rules of Arbitration Proceedings in Czechoslovakia*, 1963 BULL. CZECH. L. 23.

19. See BUTLER, *supra* note 18.

20. See John Phillips, *Arbitration: The Revolution of the 80's*, 52 ARBITRATION 75 (1986); Steven J. Stein & Daniel R. Wotman, *International Commercial Arbitration in the 1980's: A Comparison of the Major Systems and Rules*, 38 BUS. L. 1685 (1983). See generally Albert Jan van den Berg, *Why Arbitration Will Be with Us Always*, 65 ARBITRATION 248 (1999).

language of the international community. Even the resistance of China,²¹ Cuba,²² and Vietnam,²³ to some degree, would attenuate over time. The historically unprecedented bull market in the United States buttressed the ethos of financial pragmatism which spread to Asian, Latin American, and former Soviet-bloc countries. These countries were seen as emerging and re-emerging markets that proffered possibly enormous investment opportunities. Japan's fall into recession and its enduring bear market were the principal exceptions to the reign of prospective global financial prosperity.

During the 1990s, there was an eruption of UNCITRAL-inspired arbitration laws throughout the globe—from Latin American countries to Germany to former Soviet bloc states and Asian jurisdictions.²⁴ Moreover, arbitral centers were created in various countries to compete for the worldwide business of arbitration.²⁵ Most jurisdictions became hospitable to arbitration. ICA no longer was relegated to specialists or considered a renegade process. It became the symbol of and the passport to global capitalism and commercial prosperity. As noted earlier,²⁶ the success of ICA in the transactional area led to new vistas of application. A new, more public-law-oriented mission was bestowed upon the process. The arbitral procedural structure became a mechanism by which to “depoliticize” divisive diplomatic and political disputes between countries.²⁷

The Iran-United States Claims Tribunal,²⁸ created by the Algiers

21. See, e.g., Ren Jianxin, *The Establishment and Development of Foreign Trade, Economic and Maritime Arbitration in China*, 1983 Y.B. SWEDISH & INT'L ARB. 53; Roug R. Yan & Christopher Kuner, *The New Arbitration Rules of the China International Economic Trade and Arbitration Commission*, 11 ARB. INT'L 183 (1995).

22. See, e.g., OCTAVIAN CAPATINA, *LITIGIO ARBITRAL DE COMERCIO EXTERIOR* (1985).

23. See, e.g., Kazuo Iwasaki, *Arbitration of Foreign Investment Disputes in the Vietnam International Arbitration Centre*, 11 MEALEY'S INT'L ARB. REP. 29 (1996).

24. See, e.g., *International Rules & Procedural Arrangement*, 3 WORLD ARB. REP. 3081 (2000); SMIT & PECHOTA, *BIBLIOGRAPHY*, *supra* note 14, at 58-66.

25. See, e.g., Nabil N. Antaki, *The Québec National and International Commercial Arbitration Centre*, in *COMMERCIAL ARBITRATION AND MEDIATION IN THE NAFTA COUNTRIES*, *supra* note 6, at 111; Vratislav Pechota, *The British Columbia International Commercial Arbitration Centre*, 4 WORLD ARB. REP. 4211 (2001).

26. See *supra* text accompanying note 6.

27. See, e.g., Jan Paulsson, *Cross-Enrichment of Public and Private Law Dispute Resolution Mechanisms in the International Arena*, 9 J. INT'L ARB. 59 (1992).

28. See GEORGE H. ALDRIDGE, *THE JURISPRUDENCE OF THE IRAN-UNITED STATES CLAIMS TRIBUNAL* (1996); AIDA B. AVANESSIAN, *IRAN-UNITED STATES TRIBUNAL IN ACTION* (1993); CHARLES BROWER & JASON D. BRUESCHKE, *THE IRAN-UNITED STATES TRIBUNAL* (1998); THE IRAN-UNITED STATES CLAIMS TRIBUNAL 1981-1983 (R. Lillich ed., 1984); STEVEN TOOPE, *MIXED INTERNATIONAL ARBITRATION: STUDIES IN ARBITRATION BETWEEN STATES AND PRIVATE PERSONS* (1990); David D. Caron, *The Nature of the Iran-United States Claims Tribunal and the Evolving Structure of International Dispute Resolution*, 84 AM. J. INT'L L. 104 (1990); David L. Jones, *The*

Accord of 1979,²⁹ was the first significant experiment in this vein. Despite a variety of shortcomings,³⁰ the Tribunal successfully provided compensation to the commercial interests that were affected by the Iranian Revolution. It also developed an adapted arbitral procedure by which to deal with the submitted claims.³¹ The Iraqi War Claims Commission,³² located in Geneva, Switzerland, is in keeping with the experience of the Iran-United States Claims Tribunal which still sits in the Hague. The Iraqi Commission, however, will not be truly operative until Iraq begins to sell oil in the world marketplace. A tax imposed on the sale of oil funds the work and results of the commission process. Chapters 19 and 20 of NAFTA gave the arbitral adjudicatory model, as alluded to earlier,³³ the even more ambitious task of acting as a mechanism by which to resolve trade disputes between private parties and governments and between the participating governments themselves.³⁴ The NAFTA process bestows upon private parties the extraordinary right to arbitrate disputes about the impact of government conduct upon individual transactions directly with the foreign government.³⁵ The recourse to arbitration defuses such disputes—takes them out of the larger and more volatile circumstances of political contention—and provides for their resolution by impartial and expert adjudicators whose decision is basically final, binding, and enforceable. Government-to-government arbitration under NAFTA does not result in binding determinations, but rather

Iran-United States Claims Tribunal: Private Rights and State Responsibility, 24 VA. J. INT'L L. 259 (1984).

29. See Bernard Audit, *Les 'Accords' d'Alger du 19 Janvier 1981 Tendent au Règlement des Différends Entre les Etats-Unis et l'Iran*, 108 J. DU DROIT INT'L (CLUNET) 713 (1981); Andreas F. Lowenfeld, *The U.S. Iranian Hostage Settlement*, 75 AM. SOC. INT'L L. PROC. 236 (1981); Lloyd N. Cutler, *Negotiating the Iranian Settlement*, 67 A.B.A. J. 996 (1981); Gerald T. McLaughlin & Ludwick A. Taclaff, *The Iranian Hostage Agreement: A Legal Analysis*, 4 FORDHAM INT'L L.J. 223 (1981).

30. See, e.g., Charles N. Brower, *Lessons to be Drawn from the Iran-U.S. Claims Tribunal*, 9 J. INT'L ARB. 51 (1992); E. Lauterpacht, *The Iran-United States Claims Tribunal—An Assessment*, in *PRIVATE INVESTORS ABROAD: PROBLEMS AND SOLUTIONS IN INTERNATIONAL BUSINESS* 213 (M. Landwehr ed., 1982); Andreas Lowenfeld, *The Iran-U.S. Claims Tribunal: An Interim Appraisal*, 38 ARB. J. 14 (1983); Richard M. Mosk, *Lessons from the Hague—An Update on the Iran-United States Claims Tribunal*, 14 PEPP. L. REV. 819 (1987); Robert B. von Mehren, *The Iran-U.S.A. Arbitral Tribunal*, 31 AM. J. COMP. L. 713 (1983). See generally RAHMATULLA KHAN, *THE IRAN-UNITED STATES CLAIMS TRIBUNAL, CONTROVERSIES, CASES AND CONTRIBUTIONS* (1990).

31. See, e.g., STEWART ABERCROMBIE BAKER & MARK DAVIS, *THE UNCITRAL ARBITRATION RULES IN PRACTICE: THE EXPERIENCE OF THE IRAN-UNITED STATES CLAIMS TRIBUNAL* (1992); JACOMIN J. VAN HOF, *COMMENTARY ON UNCITRAL ARBITRATION RULES THE APPLICATION BY THE IRAN-U.S. CLAIMS TRIBUNAL* (1991).

32. See CARBONNEAU, *LAW AND PRACTICE*, *supra* note 1, at 918.

33. See *supra* text accompanying note 6.

34. See CARBONNEAU, *LAW AND PRACTICE*, *supra* note 1, at 880.

35. See Posin, *The Multi-Faceted Investment Arbitration Rules of NAFTA*, 13 WORLD ARB. & MED. REP. 13, 15 (2002).

seeks to frame the disputed matters in such a fashion so as to foster settlement among the implicated states.³⁶

ICA IN THE WORLD COMMUNITY

ICA has a wide but uneven standing in the world community. It originated in Europe and initially reflected the continental civilian procedural approach to adjudication.³⁷ The International Chamber of Commerce (ICC), which is headquartered in Paris, was a significant force during the 1950s in drafting and fostering the widespread acceptance of the New York Arbitration Convention.³⁸ The French government ratified the Convention within months of its being opened for signature, attesting to the importance it attached to the international arbitration process.³⁹ Moreover, French courts progressively elaborated a judicial policy that heavily favored the recourse to and the effective operation of ICA.⁴⁰ France was the principal proponent of transborder arbitration at the outset of its contemporary development.⁴¹ Once the United States government ratified the Convention in 1970 and the United States Supreme Court began to issue rulings on transborder litigation and arbitration,⁴² the doctrinal center of gravity shifted from Europe to the

36. See CARBONNEAU, *LAW AND PRACTICE*, *supra* note 1, at 880.

37. See generally RENE DAVID, *L'ARBITRAGE DANS LE COMMERCE INTERNATIONAL* (1982).

38. See W. LAWRENCE CRAIG ET AL., *INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION* (3d ed. 1999); Stephen R. Bond, *I.C.C. Arbitration in Theory and Practice*, 26 *RASSEGNA DELL'ARB.* 141 (1986); Yves Déraíns, *The Future of ICC Arbitration*, 14 *J. INT'L L. & ECON.* 437 (1980); Frederic Eisemann, *Arbitration Under the International Chamber of Commerce Rules*, 15 *INT'L & COMP. L.Q.* 726 (1966); Frederick Eisemann, *The Court of Arbitration: Outline of Its Changes from Inception to the Present Day*, in *INTERNATIONAL CHAMBER OF COMMERCE, 60 YEARS OF ICC ARBITRATION* 391 (1984); Michel Gaudet, *The International Chamber of Commerce Court of Arbitration*, 4 *INT'L TAX & BUS. L.* 213 (1986); Jan Paulsson, *The Contemporary Role of ICC Arbitration in Resolving International Business Disputes*, 9 *INT'L TRADE & PRAC.* 323 (1983); Alain Plantey, *A Major Realisation of the ICC: International Arbitration*, 5 *ICC INT'L CT. ARB. BULL.* 3 (1994); Hans Smit, *An Inside View of the ICC Court*, 10 *ARB. INT'L* 53 (1994); Russeli Bennet Stevenson, Jr., *An Introduction to ICC Arbitration*, 14 *J. INT'L L. & ECON.* 381 (1980).

39. See B. MOREAU & T. BERNARD, *DROIT INTERNE ET DROIT INTERNATIONAL DE L'ARBITRAGE* (2d ed. 1985); JEAN-LOUIS DELVOLLE, *ARBITRATION IN FRANCE, THE FRENCH LAW OF NATIONAL AND INTERNATIONAL ARBITRATION* (1982).

40. See Jean Pierre Ancel, *French Judicial Attitude Toward International Arbitration*, 9 *ARB. INT'L* 121 (1993); M. Pierre Bellet, *The Evolution of French Judicial Views on International Arbitration*, 34 *ARB. J.* 28 (1979); Thomas E. Carbonneau, *The Elaboration of a French Court Doctrine on International Commercial Arbitration: A Study in Liberal Civilian Judicial Creativity*, 55 *TUL. L. REV.* 1 (1980).

41. See Thomas E. Carbonneau, *American and Other National Variations on the Theme of International Commercial Arbitration*, 18 *GA. J. INT'L & COMP. L.* 143 (1988).

42. See Thomas E. Carbonneau, *L'Arbitrage en Droit Américain*, 1988 *REV. ARB.* 3; Thomas E. Carbonneau, *Le Droit Américain de l'Arbitrage*, in *L'ARBITRAGE TRAVAUX OFFERTS AU PROFESSEUR ALBERT FETTWEIS* 205 (L. Matray & G. de Leval eds., 1989).

United States. As noted earlier,⁴³ when Wall Street lawyers finally accepted the primacy of arbitration in transborder commercial litigation, an even greater volume of international commercial litigation migrated from domestic courts to transborder arbitral tribunals. The influence of the Anglo-American legal profession extended to the structure of arbitral proceedings, which began to mirror the basic characteristics of a United States common law trial. In effect, the coexistence of two influential centers of legal doctrine on arbitration instituted a struggle between the European civil law and the Anglo-American common law for dominance in the conduct of arbitral proceedings. This tension continues to be present in contemporary arbitral practice.⁴⁴

LATIN AMERICA

Accordingly, despite some reservations here and there about the process, Northern Western countries accepted ICA as necessary and professed support for the process. In recent times, ICA has become more popular in formerly inhospitable regions like Latin America.⁴⁵ Mexico's adhesion to the consensus on ICA is a good example.⁴⁶ Historically, from the perspective of the Mexican government, the settlement of boundary and other disputes through international claims commissions in the nineteenth and early twentieth centuries made any recourse to international adjudicatory processes suspect.⁴⁷ The commissions were seen (not inaccurately, in most instances) as an ill-disguised mechanism by which the United States imposed its will upon its weaker, southern neighbor and furthered its own interests. Accordingly, Mexico refused, by and large, to participate in such proceedings and embraced the rationale of the Calvo Clause,⁴⁸ providing for the national treatment of foreign investors and the exclusive reference to local remedies for the resolution of foreign investment disputes. In response to the emergence of globalization, Mexico revised its position on arbitration.⁴⁹

In 1993, Mexico became one of the first Latin American countries to adopt a modern arbitration statute based upon the UNCITRAL Model

43. See *supra* text accompanying note 20.

44. See CARBONNEAU, *LAW AND PRACTICE*, *supra* note 1, at 613-24.

45. See, e.g., Cedric Barclay, *Arbitration in Latin America*, 43 *ARBITRATION* 105 (1977).

46. See Alejandro M. Garro, *Mexico*, 2A *WORLD ARB. REP.* 2059 (1994); Grigeria Naón, *Arbitration in Latin America: Recent Developments in Mexico and Colombia*, 4 *JAHRBUCH SCHIEDSGERICHTS BARKEIT* 263 (1990); José Luis Siqueirois, *Mexican Arbitration—The New Statute*, 30 *TEX. INT'L L.J.* 227 (1995); José Luis Siqueirois, *Mexico*, 15 *Y.B. COM. ARB.* 307 (1990).

47. See, e.g., José Luis Siqueirois, *Mexico*, *supra* note 46.

48. *Id.*

49. See *supra* note 46.

Law.⁵⁰ The Mexican endorsement of ICA symbolized a desire and willingness to participate in world commerce on transborder terms. A number of other Latin American countries, including Brazil (1996), Bolivia (1997), Colombia (1996), Costa Rica (1997), Ecuador (1997), Guatemala (1995), Panama (1999), Peru (1995), and Venezuela (1998),⁵¹ followed the Mexican example. These countries enacted modern, UNCITRAL-inspired arbitration statutes. The new legislation, along with the ratification of major international conventions on arbitration (the Inter-American Conventions,⁵² the ICSID Convention,⁵³ and the New York Arbitration Convention),⁵⁴ at least created the impression of a favorable national posture toward arbitration.

The depth of commitment to ICA in the individual countries, however, is difficult to gauge accurately, especially in circumstances in which the enforcement of an international arbitral award might be antagonistic to local interests or favor a national or corporate entity from a country with a well-developed economy. Despite the adoption of a modern statutory framework, courts in some of these countries might be reluctant or refuse to enforce such international arbitral agreements and awards. They could use procedural delay to thwart enforcement indirectly or invoke the public policy exception to express direct opposition. Thus far, the days of the Calvo Clause appear to be a bygone era. There also seems to be a great enthusiasm among Latin American countries for mediation (known there as conciliation). It is difficult to ascertain whether mediation has become an effective competitor of arbitration in

50. See Julio Trevino, *The New Mexican Legislation on Commercial Arbitration*, 5 J. INT'L ARB. 5 (1994); Isabel Zivy, *La Nouvelle Loi Sur l'Arbitrage au Mexique*, 1994 REV. ARB. 295.

51. See generally 2 & 2A WORLD ARB. REP., *supra* note 24.

52. The Inter-American (Panama) Convention on Arbitration of 1975, done at Panama City on Jan. 30, 1975, entered into force Jan. 16, 1976, reprinted in 14 I.L.M. 336 (1975); The Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards (May 8, 1979), reprinted in 18 I.L.M. 1224 (1979). See CHARLES NORBERG, *INTER-AMERICAN COMMERCIAL ARBITRATION* (1989); Charles Norberg, *United States Implements Inter-American Convention on Commercial Arbitration?*, 45 ARB. J. 23 (1990); Alejandro M. Garro, *Inter-American Convention on International Commercial Arbitration, 1975*, 1 WORLD ARB. REP. 255.1 (1987); Alejandro M. Garro, *The Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards*, 1 WORLD ARB. REP. 265.0 (1992).

53. The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, opened for signature Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159, reprinted in 4 I.L.M. 532 (1965). See Aron Broches, *The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, 136 REC. COURS 333 (1972); Georges R. Delaume, *La Convention pour le Règlement des Différends Relatifs aux Investissements Entre Etats et Ressortissants d'Autres Etats*, 93 J. DU DROIT INT'L (CLUNET) 26 (1966); Michael Moore, *International Arbitration Between States and Foreign Investors—The World Bank Convention*, 18 STAN. L. REV. 1359 (1966); Christopher Schreuer, *Commentary on the ICSID Convention*, 12 ICSID REV. 60 (1997); 12 ICSID REV. 365 (1997); 13 ICSID REV. 150 (1998); 13 ICSID REV. 478 (1998); 14 ICSID REV. 421 (1999).

54. See *supra* text accompanying note 14.

the Latin American setting and whether the current economic decline and episodic political instability will have a substantial impact upon the stature of ICA in the area.

Venezuela, until recently, illustrated the new Southern experience with arbitration.⁵⁵ In 1997, legislation was introduced in the Venezuelan legislature to modernize the national legal regulation of domestic and international commercial arbitration. Although Venezuela was a party to several international conventions on arbitration, for example, the New York Arbitration Convention and two Inter-American Conventions on Arbitration, it had no national law that specifically regulated commercial arbitration. A new Venezuelan law on arbitration was enacted in March 1998.⁵⁶

The new law sought to create a modern statutory regime. It was modeled upon the 1985 UNCITRAL Model Law on Arbitration. It regulated the scope of arbitration, the types of arbitration agreements, the arbitral proceedings, the powers of the arbitral tribunal, the functions and obligations of the arbitrators, and the enforcement of awards. It applied exclusively to commercial arbitration. The provisions of the Code of Civil Procedure on Civil Arbitration and the separate rules on arbitration in the maritime, consumer, and agricultural areas remained in effect.

The law achieved a number of interrelated objectives: (1) to give national and international investors in Venezuela a sense of juridical security; (2) to recognize and establish the contractual freedom of commercial parties to submit their disputes to arbitration according to a framework of provisions that best serves their interest; (3) to guarantee the adaptability, impartiality, and integrity of the arbitral process as a dispute resolution mechanism; (4) to conform Venezuelan law to international principles on the regulation of arbitration; (5) to allow Venezuela to serve as a venue for international arbitration; and (6) to enable Venezuela to compete with other Central and Latin American countries which have enacted modern laws on arbitration.⁵⁷

The law's chief innovation resided in the establishment of a process for the direct recognition and enforcement of international arbitral awards. Title XIX of the Venezuelan Code of Civil Procedure requires that foreign juridical acts, including international arbitral awards, be submitted to an *exequatur* procedure for purposes of enforcement.⁵⁸

55. The author adapted the following commentary and description from his previous work. See CARBONNEAU, LAW AND PRACTICE, *supra* note 1, at 1040-45. See also Alejandro M. Garro, *Venezuela*, 2B WORLD ARB. REP. 2911 (1987).

56. *See id.*

57. *See id.*

58. *See id.*

Under the *exequatur* procedure, the petition for enforcement is submitted to the Venezuelan Supreme Court which can review both the form and content of the foreign juridical act. An exception to the procedure exists on the basis of reciprocity for countries that enforce Venezuelan judgments without a review of the merits. Although it is unclear how Venezuela's obligations under the various international treaties on arbitration implicate the *exequatur* procedure, it appeared that—as a general rule—international arbitral awards were subject to the *exequatur* procedure. Because the action before the Venezuelan Supreme Court was an ordinary civil proceeding not subject to any statute of limitation, the enforcement process could create considerable delay and uncertainty.

The new legislation on arbitration eliminated the *exequatur* procedure for the enforcement of international arbitral awards rendered in any internationally-recognized country.⁵⁹ Such awards were deemed final, binding, and unappealable. The petition for enforcement was to be brought before the Commercial Court of First Instance and was subject to judicial supervision and vacatur essentially only upon the grounds for nullifying an award.⁶⁰ The streamlining and liberalization of the enforcement procedure sent an unambiguous message that Venezuela endorsed the global consensus on arbitration and wanted to be a player in the global marketplace.

It should be noted, however, that the national resolve in favor of ICA in some Latin American countries may be precarious. For example, it is reported that, on December 13, 2001, the Supreme Court of Panama ruled, with one dissenting vote, that the doctrine of *kompetenz-kompetenz* was unconstitutional under Panamanian law.⁶¹ The court reasoned that arbitrators had no legal standing upon which to decide the propriety of their jurisdiction. Only courts, using their publicly-conferred authority, could rule on such questions. As the earlier European history on arbitration illustrates with unmistakable clarity, such a ruling (despite its formal conceptual rectitude) is highly antagonistic to the interests and operation of arbitration. As a result of the opinion, every arbitral proceeding held in Panama or subject to Panamanian law is vulnerable to a jurisdictional challenge before a court either at the head or at the back end of the proceeding. This opportunity for dilatory obfuscation can easily result in a two-year or longer delay and the eventual nonenforcement of the award. This development shall hinder considerably the recourse to arbitration in Panama.

59. *See id.*

60. *See id.*

61. Interview between the author and a Panamanian lawyer (Eric Britton-Gallardo), Jan. 30, 2002.

ASIA

By comparison, ICA has an ambiguous standing in Asian countries, such as Japan, Singapore, the new Hong Kong, and India. The Japanese endorsement of ICA is limpid and unenergetic.⁶² Institutional centers for the conduct of international arbitrations have existed in Japan for years, but the volume of cases has never been substantial and a strong internal arbitration community has never been established. Nonetheless, Japan is a party to all of the major international conventions on arbitration, including the New York Arbitration Convention.⁶³ Arbitral awards generally have the same effect in Japan as the final and binding judgments of a court of law. The Japanese Chamber of Commerce and Industry maintains a Commercial Arbitration Association.⁶⁴ The Japan Commercial Arbitration Association (JCAA) is one of Japan's best known arbitral institutions; established in 1953, it resolves disputes arising from international and domestic business transactions. The JCAA has cooperative agreements with thirty-three major arbitral institutions, including the American Arbitration Association (AAA) and the London Court of International Arbitration (LCIA).⁶⁵

The Japan Shipping Exchange, Inc. (JSE) conducts maritime arbitrations through the Tokyo Maritime Association Commission (TOMAC). The JSE came into being in the mid-1930s and progressively expanded the range of maritime disputes that were submitted to arbitration. Despite its national and historical significance, the JSE does not handle a huge volume of business (at least, by New York and London standards).⁶⁶ Since its inception, the JSE has had some 450 cases.⁶⁷ Arbitral awards rendered through JSE and TOMAC arbitration are made public on an anonymous basis.⁶⁸ The objective of this practice is to foster the understanding of the arbitration process and its suitability for resolving commercial disputes. The public availability of awards also is meant to heighten the development of commercial custom and practices.

The protracted arbitral procedure described in *Fotochrome, Inc. v.*

62. The author adapted the following commentary and description from his previous work. See CARBONNEAU, LAW AND PRACTICE, *supra* note 1, at 1046-48. See also Hagizawa, *The Prospective Revision of Japanese Arbitration Law*, 13 WORLD ARB. & MED. REP. 17 (2002); Robert Bennet Lubic, *International Commercial Arbitration in Japan: Background and Suggestions*, 2 AM. REV. INT'L ARB. 87 (1991). See generally PHILIP MCCONNAUGHAY & THOMAS GINSBURG, INTERNATIONAL COMMERCIAL ARBITRATION IN ASIA (2002).

63. See *id.*

64. See *id.*

65. See *id.*

66. See *id.*

67. See *id.*

68. See *id.*

Copal Co.,⁶⁹ attests to the strong cultural preference in Japan for negotiated dispute settlement rather than adjudication.⁷⁰ In fact, private, unofficial adjudication is seen as the worst form of adjudication. While participation in court proceedings may constitute a public humiliation under Japanese concepts, the authority of the judge at least is conferred by public processes. By contrast, the arbitrator's mandate results merely from private agreement. Some commentators have ascribed the static state of arbitration in Japan to the fact that few Japanese attorneys speak English. Linguistic insularity contributes to the lack of outreach. Also, the Japanese code provisions on arbitration are dated.⁷¹ They were borrowed from the German codes and, as a result, reflect a nineteenth-century view of the legal regulation of arbitration.⁷² In 1979, a law group was commissioned to draft a new arbitration law.⁷³ In 1989, the group completed a draft law that contained modern provisions and modern principles of arbitration law.⁷⁴ The draft law, however, has yet to be introduced into the Japanese diet. Other area-wide reforms—in banking or product liability—may be considered more pressing by government officials. In any event, the Japanese misgivings about arbitration are not shared by the other major players in international trade and commerce.⁷⁵ Finally, these features of Japanese arbitration indicate that Japan is not ready to assume a position of regional leadership in ICA.

Singapore⁷⁶ differs significantly from Japan in its approach to ICA. It appears eager to become the Asian center for ICA. Recently, it has adopted new laws that favor arbitration.⁷⁷ There also is an administrative center for arbitration that actively supports the recourse to arbitra-

69. 517 F.2d 512 (2d Cir. 1975).

70. See *supra* note 62 and accompanying text.

71. See *id.*

72. See *id.*

73. See *id.*

74. A copy of the original draft of the proposed law is contained in: THOMAS E. CARBONNEAU, CASES AND MATERIALS ON COMMERCIAL ARBITRATION DOCUMENTARY SUPPLEMENT 137 (1997).

75. See Hagizawa, *supra* note 62.

76. See Lawrence Boo, *Singapore*, in INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION (P. Sanders & A. Van Den Berg eds., Supp. Aug. 21, 1996); Thomas R. Kloetzel, *Arbitration in Singapore—Recent Developments*, 61 ARBITRATION 108 (1995).

77. See Robert Morgan, *The Arbitration Act 1996 and Arbitration Law Reform in Hong Kong and Singapore: A Brave New World?*, 1997 ARB. & DISP. RES. L.J. 177; see also Lawrence Boo, *Singapore's International Arbitration Act 1994—Some Salient Features*, 1996 ARB. & DISP. RES. L.J. 200; Lawrence Boo & Charles Lim, *Overview of the International Arbitration Act and Subsidiary Legislation in Singapore*, 12 J. INT'L ARB. 75 (1995). See *Arbitration Legislation in Singapore*, 13 WORLD ARB. & MED. REP. 7 (2002); *Domain Name Dispute Resolution in Singapore*, 13 WORLD ARB. & MED. REP. 5 (2002).

tion in the international marketplace.⁷⁸ In seeking to assume a dominant position, however, Singapore must contend with the new Hong Kong.⁷⁹ Prior to the historic reunification in 1999, Hong Kong was a bustling center of capitalism and could serve as a meeting place for East-West business interests. Its present-day ability to act as a venue for international business and commercial adjudication is uncertain. Historically and geographically, it is an ideal setting for achieving such intermediation. Ultimately, its status within the global commercial community will be decided by the vicissitudes of both internal Chinese and international politics.⁸⁰ Moreover, with the formation and development of CIETAC arbitration,⁸¹ China as a whole is attempting to become a player in the area.

Arbitration in China is governed by the 1995 Arbitration Law and the 1991 Civil Procedure Law.⁸² The Arbitration Law of China was enacted to ensure the fair and timely arbitration of disputes relating to economic matters. China maintains a bifurcated approach to foreign-related and domestic arbitration cases, applying distinct sets of rules and procedures for conducting arbitration proceedings and enforcing awards under each category.⁸³ China's courts commonly consider a case foreign-related only in circumstances in which at least one party to the dispute is registered in a foreign jurisdiction or is a foreign national; the subject matter of the transaction is foreign; or the legal relationship was made, amended, or terminated outside China.⁸⁴ Cases involving exclu-

78. See Joseph Bellhouse, *Singapore: International Arbitration Center Established*, 3 ASIA L. & PRAC. 31 (1991).

79. See N. KAPLAN ET AL., *HONG KONG ARBITRATION: CASES AND MATERIALS* (1991); N. KAPLAN ET AL., *HONG KONG AND CHINA ARBITRATION: CASES AND MATERIALS* (1994); R. MORGAN, *THE ANNOTATED ORDINANCES OF HONG KONG—THE ARBITRATION ORDINANCE* (1996); R. MORGAN, *THE ARBITRATION ORDINANCES OF HONG KONG: A COMMENTARY* (1997); Charles Lin, *Enforcement of Mainland China's Arbitral Awards in the Hong Kong Special Administrative Region After 1 July 1997*, 65 ARBITRATION 56 (1999).

80. See Michael J. Moser, *China-Hong Kong Enforcement Arrangement Becomes Effective*, 15 MEALEY'S INT'L ARB. REP. 24 (2000); Michael J. Moser, *Hong Kong and Mainland China Sign Agreement for Reciprocal Enforcement of Arbitral Awards*, 14 MEALEY'S INT'L ARB. REP. 22 (1999).

81. See Huang Yamming, *Some Remarks About the 1994 Rules of CIETAC and "China's New International Arbitration Rules"*, 11 J. INT'L ARB. 105 (1994); Ge Liu & Alexander Lourie, *International Commercial Arbitration in China: History, New Developments, and Current Practice*, 28 J. MARSHALL L. REV. 539 (1995); Michael J. Moser, *China's New International Arbitration Rules*, 11 J. INT'L ARB. 5 (1994); Michael J. Moser & Zhang Yulin, *The New Arbitration Rules of the China International Economic and Trade Arbitration Commission*, 13 J. INT'L ARB. 15 (1996); Vratislav Pechota, *China International Economic and Trade Arbitration Commission (CIETAC)*, 4 WORLD ARB. REP. 4315 (2000).

82. The author adapted the following commentary and description from his previous work. See CARBONNEAU, *LAW AND PRACTICE*, *supra* note 1, at 1048-52.

83. See *id.*

84. See *id.*

sively Chinese-registered entities and transactions located in China are considered domestic. When hearing an action for the enforcement of a domestic arbitral award, the People's Court can review both the arbitral procedure and the substance of the award.⁸⁵ The Law of Civil Procedure provides that the award shall be denied enforcement if the People's Court determines that the main evidence is insufficient to support the allegations made in the record.

In China, international arbitrations or arbitrations with a foreign element are administered almost exclusively by two arbitral institutions. The China Maritime Arbitration Commission (CMAC) administers the arbitration of maritime disputes.⁸⁶ The China International Economic Trade and Arbitration Commission (CIETAC) administers the arbitration of disputes that arise from foreign-related economic and trade activity.⁸⁷ CIETAC represents an acknowledgement by the Chinese government of the necessity of international trade and commerce and the central role of arbitration in stabilizing the international marketplace.

The initial experience with CIETAC as a provider of institutional arbitral services appeared to be very promising. The annual caseload was enormous on a comparative basis—700 or 800 cases yearly, for example, to the ICC's otherwise leading 450 to 500 cases. The amount of money involved in these cases, however, was substantially inferior to the money involved in a typical ICC case. Also, to a considerable extent, the creation of CIETAC arbitration reflected an insular objective on the part of the Chinese government: If foreign nationals and companies wanted to do business in China, and if they demanded arbitration as the means of resolving transactional disputes, arbitration would take place on Chinese terms. Chinese government policy in this area, therefore, was protectionist and was based upon a characteristic distrust of foreign practices and parties. CIETAC arbitration was not made accountable to the usual competitive forces of the international marketplace.

The contemporary experience with CIETAC arbitration portends a less promising future. CIETAC's annual volume of cases has decreased steadily since 1996 and there are reports that CIETAC proceedings are subject to local influence and corruption.⁸⁸ Hong Kong authorities, in particular, have expressed serious reservations about the credibility, desirability, and enforceability of CIETAC arbitral awards.⁸⁹ At least

85. *See id.*

86. *See id.*

87. *See id.*

88. *See CIETAC Arbitration May Be Declining in Stature and Performance*, 12 *WORLD ARB. & MED. REP.* 304 (2001).

89. *See supra* note 80 and accompanying text.

for the moment, CIETAC's ascendancy has been stymied and retrogressive dispositions appear to be controlling its development.

Other members of the Asian communist world seem to be embracing arbitration and international commerce. Despite long-standing difficulties, Vietnam has demonstrated of late a genuine willingness to comply with the *quid pro quos* of ICA.⁹⁰ In late 2001, the Lam Dong People's Court confirmed an arbitral award rendered by the International Chamber of Commerce and Industry (ICCI) in Geneva, Switzerland against a Vietnamese company and in favor of a South Korean company.⁹¹ The arbitrators ruled that the Vietnamese company, the Vietnam Sericulture Corporation (Viseri), breached its contract with the South Korean Kyunggo Silk Company.⁹² The award required Viseri to pay (US) \$425,891 to the Korean enterprise.⁹³ The court rejected Viseri's arguments opposing the enforcement of the award.⁹⁴ Remarkably, it held that the award "conformed to international practices, the Vietnam Trade Law, and the ordinance on international arbitration in Vietnam."⁹⁵

The willingness to accept both the losses and gains associated with international commercial activity is instrumental to a country's effective integration into the stream of international business. Courts and national legislation cannot simply pursue the protection of nationals or national economic interests in transborder economic exchanges but must uphold the universal role of contract and embrace the practices of the international commercial community. Constraining business by state-controlled systems cannot result in meaningful national economic growth and development. In this case, Vietnam has exhibited a desire to accept the discipline of the international marketplace and of the transborder rule of law.

Finally, in the last several years, India has endeavored to revise its position on ICA.⁹⁶ Its previous reservations may have stemmed from

90. See Le Cong Dinh, *Arbitration in Vietnam*, 11 WORLD ARB. & MED. REP. 164 (2000); Ha Hung Cuong, *Le Droit Viétnamien sur l'Arbitrage Économique et Sur la Reconnaissance et l'Exécution des Sentences Arbitrales Étrangères au Vietnam*, 49 REV. INT'L DR. COMP. 919 (1997); Kazuo Iwasaki, *Arbitration of Foreign Investment Disputes in the Vietnam International Arbitration Centre*, 11 MEALEY'S INT'L ARB. REP. 29 (1996); Thuy Le Tran, *Vietnam: Can An Effective Arbitration System Exist?*, 20 LOY. L.A. INT'L & COMP. L. REV. 361 (1998); Tran Huu Huynh, *Le Centre d'Arbitrage International du Viétnam*, 49 REV. INT'L DR. COMP. 913 (1997).

91. See *Foreign Arbitral Award Held Enforceable in Vietnam*, 13 WORLD ARB. & MED. REP. 62 (2002).

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. The author adapted the following commentary and description from his previous work. See CARBONNEAU, *LAW AND PRACTICE*, *supra* note 1, at 1054-55. See also Russel Taylor, *India*, 2A WORLD ARB. REP. 1837 (1988).

geo-political positioning and been grounded in political ideology. In any event, in 1996, India adopted the Arbitration and Conciliation Ordinance based upon the UNCITRAL Model Law on Arbitration.⁹⁷ The purpose of the legislation was to stabilize the arbitration system in India and to encourage foreign investment.⁹⁸ The then-Prime Minister told Indian lawyers that it was necessary to bring Indian laws on the settlement of disputes in line with international standards because the economy was undergoing substantial reforms. Previous arbitration acts required court decrees to enforce arbitral awards, and courts were given wide latitude to vacate awards. The new ordinance made several improvements to the prior law. It allowed arbitral tribunals to promote the use of conciliation during the arbitral proceeding in order to encourage the parties to settle the dispute.⁹⁹ If the parties settled during the arbitral proceeding, their agreement would be recorded and given the same effect as an arbitral award. An arbitration award or settlement pursuant to conciliation was automatically deemed a decree of an Indian court, thereby expediting the enforcement of the determination. There were fewer grounds for setting aside an award. Finally, the ordinance required a party challenging a domestic award to deposit the amount of the award in court prior to filing its challenge.¹⁰⁰

Moreover, parties were given the freedom to control many aspects of the arbitration process through the arbitration agreement. Among other things, the parties could control the number and selection of arbitrators, the procedure of the arbitration, the presentation of evidence, and the use of experts.¹⁰¹ There were, however, mandatory requirements regarding the conduct of the arbitral proceedings. If the arbitration took place in India, and the conflict being adjudicated was not an international commercial dispute, the tribunal had to decide the dispute in accordance with Indian laws.¹⁰² When the dispute was international, the arbitral tribunal decided by reference to the rules of law designated by the parties.¹⁰³ If the parties did not select an applicable law, the tribunal would apply the rules of law it considered appropriate in the circumstances.¹⁰⁴

Under the ordinance, an arbitral award could be set aside if: (1) an arbitrating party was under some incapacity; (2) the agreement was null

97. *See id.*

98. *See id.*

99. *See id.*

100. *See id.*

101. *See id.*

102. *See id.*

103. *See id.*

104. *See id.*

under the applicable law; (3) a party was not given proper notice of the appointment of the arbitrator or of the proceedings; (4) the award dealt with a dispute outside the scope of the arbitration agreement; or (5) the composition of the arbitral tribunal or the arbitral procedure violated Indian public policy.¹⁰⁵ Parties were obligated to file an action to set aside the award within three months of the date of rendition.¹⁰⁶ Domestic awards become effective as a decree of the court three months after rendition. Enforcement of a foreign award could be refused only if, in addition to the reasons for vacating a domestic award, the award had not yet become binding on the parties, or the subject matter was not capable of settlement by arbitration under Indian law.¹⁰⁷

In addition, the Indian Supreme Court, in several recent rulings,¹⁰⁸ interpreted the newly-enacted legislation in a way that favors arbitration. Although there have been clear efforts to establish India as a jurisdiction that is supportive of international arbitration, attempts to promote arbitration and ADR domestically have generally met with less success. The crowded court dockets make such alternative processes a virtual necessity, but the establishment of centers and programs have not had the desired educational impact upon the legal profession and the public.¹⁰⁹

PROBLEMS AND DISSENTING POSITIONS

However well-established ICA may be in the legal civilization of the world community, it remains possible, even under Article V of the New York Arbitration Convention,¹¹⁰ to thwart the enforcement of an international arbitral award. In an unreported case, for example, a Sri Lankan court refused to enforce an LCIA arbitral award.¹¹¹ The award on the merits appeared to be perfectly sound. It involved a straightforward ruling on a clear-cut and expensive breach of contract. The procedure of rendition and the conduct of the proceedings seemed to be in full

105. *See id.*

106. *See id.*

107. *See id.*

108. *See Indian Supreme Court Rejects Award of Pre-Reference Interest by Arbitrator*, 8 WORLD ARB. & MED. REP. 287 (1997); *Supreme Court of India Rules that Arbitral Award Rendered in Ukraine is Enforceable*, 9 WORLD ARB. & MED. REP. 127 (1998); *India Increasingly Supportive of Mediation*, 9 WORLD ARB. & MED. REP. 128 (1992); *Arbitration and ADR Developments in India*, 9 WORLD ARB. & MED. REP. 150 (1992).

109. *See supra* note 108. The most recent revision of national law in the Asian region is Indonesia. *See* Yayan Mulyana & Jan Schaefer, *Indonesia's New Framework for International Arbitration: A Critical Assessment of the Law and its Application by the Courts*, 17 MEALEY'S INT'L ARB. REP. 39 (2002).

110. For references to the New York Arbitration Convention, *see supra* note 14 and accompanying text.

111. *See generally* COMMERCIAL ARBITRATION LAW IN ASIA AND THE PACIFIC (K. Simmonds et al. eds., 1987).

conformity with generally-accepted standards. Despite the compliance of the award to existing standards, the Sri Lankan court ruled that the award could not be enforced because it violated domestic public policy.

Additionally, in the celebrated *Chromalloy* case,¹¹² the Cairo Court of Appeals set aside an ICC arbitral award rendered in Egypt against the Egyptian Air Force and in favor of a Houston, Texas company because, in its view, the arbitrators did not correctly apply Egyptian law in their ruling. While such a ground is a legitimate basis for nullification under the New York Arbitration Convention,¹¹³ the court's evaluation of the arbitrators' application of law was quite strained.

These enforcement rulings constitute unfortunate and poorly-disguised attempts to protect nationals or national entities from basic contract accountability.¹¹⁴ Pervasive protectionism could foil the entire transborder arbitral process. In addition, protectionism is more likely in countries outside the Northern-Western consensus on arbitration. Opposition to ICA can be based upon factors like political ideology, disparate views of economic development, differences in religious belief, or the lack of a truly functional rule of law or national legal and political institutions.

For example, despite their ratification of the New York Arbitration Convention, the former republics of the U.S.S.R., including the Russian Republic itself, may not benefit from the type of internal institutional and social stability that is necessary for the effective enforcement of international arbitral awards.¹¹⁵ Without the discipline of enforcement,

112. *In re Arbitration of Certain Controversies Between Chromalloy Aeroservices & the Arab Republic of Egypt*, 939 F. Supp. 907 (D.C. Cir. 1996).

113. For references to the New York Arbitration Convention, see *supra* note 14 and accompanying text.

114. On this question, see, for example, Philippe Fouchard, *Le Portée Internationale de l'Annulation de la Sentence Arbitrale dans son Pays d'Origine*, 1997 REV. ARB. 329; Emmanuel Gaillard, *The Enforcement of Awards Set Aside in the Country of Origin*, 14 ICSID REV.—FOR. INV. L.J. 16 (1999); Hamid Gharavi, *Enforcing Set Aside Arbitral Awards: France's Controversial Steps Beyond the New York Convention*, 6 FLA. ST. J. TRANSNAT'L L. & POL'Y 93 (1996); Hamid Gharavi, *Chromalloy: Another View*, 12 MEALEY'S INT'L ARB. REP. 21 (1997); Hamid Gharavi, *The Legal Inconsistencies of Chromalloy*, 12 MEALEY'S INT'L ARB. REP. 21 (1997); Jan Paulsson, *The Case for Disregarding LSAs (Local Standard Annulments) Under the New York Convention*, 7 AM. REV. INT'L ARB. 99 (1996); Jan Paulsson, *Rediscovering the N.Y. Convention: Further Reflections on Chromalloy*, 12 MEALEY'S INT'L ARB. REP. 20 (1997).

115. See William E. Butler, *Arbitration Clauses in the Post-Soviet Era*, 1993 Y.B. SWEDISH & INT'L ARB. 17; Vincent Godbillon, *La Problématique Actuelle de l'Arbitrage Commercial International Russe*, 17 BULL. SWISSE ARB. ASSOC. 285 (1999); Andrei M. Goroditsky, *Arbitration in Russia*, in LITIGATION AND ARBITRATION IN CENTRAL AND EASTERN EUROPE 103 (D. Rivkin & C. Platto eds., 1998); Jeffrey M. Hertzfeld, *The Status of Arbitration Agreements and the Arbitral Process in the States of the Former Soviet Union*, 1993 Y.B. SWEDISH & INT'L ARB. 27; Peter B. Maggs, *International Business Contract and Arbitration Law in the Former Soviet Union Republics*, 7 INT'L ARB. REP. 18 (1992); Burke McDavid, *Arbitration-Alternatives with a Russian Party*, 32 INT'L LAW. 119 (1998); Vratislav Pechota, *Russian Federation*, 2A

arbitration is substantially weakened and foreign business interests have almost no means of protecting investments. The circumstances of former Soviet bloc countries are made difficult by the internal strife that paralyzes the operation of domestic institutions and by the special Russian view of arbitration as consisting of specialized commercial courts operated by the government.¹¹⁶

Further, the exploitation of national resources and the sale of commodities in some settings may fall under the exclusive dominion of the re-emerging state. Under its law, the state alone—through sovereign fiat—determines legal accountability within the local territory,¹¹⁷ making a rule of law through arbitration or another process impossible. The variegated religious composition of a country or other sociological factors may also have a bearing upon whether the transborder arbitral process can operate effectively within a country. The circumstances of developing, emerging, or re-emerging states are elusive and shifting. They are always more complicated than initially envisaged. These considerations make it even more difficult to establish a firm commitment to ICA among these countries.

The most visible “hold-outs” from the international consensus on arbitration have been, by and large, the Middle Eastern Muslim countries.¹¹⁸ Saudi Arabia appears to be the country that has taken the most negative position on ICA, questioning its value, origins, and legitimacy.¹¹⁹ For example, although the Saudi government has ratified the New York Arbitration Convention,¹²⁰ Saudi law makes the enforcement of an international arbitral award difficult and time-consuming. Such an award is enforceable only if it is accompanied by a court judgment from the state of rendition.¹²¹ The award must be authenticated by the Saudi Ministry of Foreign Affairs, the Saudi Ministry of Justice, and the Saudi consulate in the state of rendition.¹²² Moreover, an award not rendered in Arabic must be translated by a sworn translator before it can be sub-

WORLD ARB. REP. 2355 (1994); Volker Viechtbauer, *Arbitration in Russia*, 29 STAN. J. INT'L L. 355 (1993).

116. See Pechota, *supra* note 115, at 2355.

117. See generally *id.*

118. See generally SMIT & PECHOTA, BIBLIOGRAPHY, *supra* note 14, at 661-63.

119. The author adapted the following commentary and description from his previous work. See CARBONNEAU, LAW AND PRACTICE, *supra* note 1, at 38-39. See also M.I.M. Aboul-Enein, *The Development of International Commercial Arbitrating Laws in the Arab World*, 65 ARBITRATION 314 (1999); Nancy B. Turck, *Saudi Arabia*, in INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION (P. Sanders & A. Van Den Berg gen. eds., Supp. Jan. 17, 1994). See generally ABDUL HAMID EL-AHDAB, ARBITRATION WITH THE ARAB COUNTRIES (2d ed. 1999).

120. See Abdul Hamid El-Ahdab, *Saudi Arabia Accedes to the New York Convention*, J. INT'L ARB., Sept. 1994, at 87.

121. See *supra* note 119 and accompanying text.

122. See *id.*

mitted to the Saudi government through proper diplomatic channels.¹²³ The Saudi government reserves the right to refuse enforcement of an award.¹²⁴ Awards rendered by default against a Saudi party are automatically unenforceable.¹²⁵ This rule can give Saudi parties an enormous advantage in international litigation if all their assets are located in Saudi Arabia. Enforcement of awards from countries that are not members of the Arab League Convention is based on reciprocity. If an award is not enforceable, the party holding the award may file an action before the Saudi Board of Grievances to obtain a determination of the dispute under Saudi law.¹²⁶ An award rendered against the Saudi government or its agents is not enforceable.¹²⁷ If the Saudi government or its agencies are a party to a contract, arbitration is prohibited unless the President of the Council of Ministers consents to the provision.

Bahrain is the Arab state that appears to be most adapted to the Western view of international commercial arbitration. In Decree No. 9 of August 16, 1994, it adopted the UNCITRAL Model Law on arbitration with very few changes.¹²⁸ Previously, in Decree No. 9 of May 20, 1993, the Bahrain Centre for International Commercial Arbitration was established.¹²⁹ The Centre uses the UNCITRAL Rules on Arbitration and enforces awards in accordance with the New York Arbitration Convention.¹³⁰ Bahrain acceded to the Convention in 1988.¹³¹

ICA certainly cannot eradicate or even subdue all of the tensions and conflicts that exist among nations in the world community. The international practitioner must be attentive to the local variations that can exist on a given theme or problem of arbitration law. Despite the diversity of views within the family of nations, globalization has emerged and participation in international commerce is seen by most countries as a desirable objective. A system of transborder arbitration is essential to the pursuit of commerce across national boundaries. Therefore, countries at least pay lip-service to ICA; many of them are attempting to become an integral part of the process; yet others have fully acceded to its ground rules, structures, and operation.

123. *See id.*

124. *See id.*

125. *See id.*

126. *See id.*

127. *See id.*

128. *See id.*

129. *See id.*

130. *See id.*

131. *See id.*

THE BUSINESS OF ARBITRATION

A number of traditional service-providers have a virtual lock upon the transborder arbitration service industry. It is difficult for newcomers to establish a foothold in the area. There is also intense competition among the existing institutions for clients.¹³² The American Arbitration Association (AAA)¹³³ is the only entity that has made a new institutional inroad into the business of ICA. Previously, the AAA administered international arbitrations on a small scale. It has, however, a long-standing history as a domestic arbitral service-provider. In June 1996, the AAA created the International Center for Dispute Resolution. Since its inception, the Center has administered more than 1,000 cases, and its annual caseload is approaching 400 cases.¹³⁴ In 2001, the AAA also opened a European Office of the International Arbitration Center in Dublin, Ireland. The Irish International Arbitration Centre represents the AAA's second institutional incursion into the highly territorialist domain of ICA.¹³⁵ It is too early to determine whether the second venture is likely to be as successful as the first.

The International Chamber of Commerce (ICC),¹³⁶ headquartered

132. See generally David Hacking, *A New Competition—Rivals for Centres of Arbitration*, 45 ARBITRATION 166 (1979).

133. See Robert Coulson, *American Arbitration Association*, in ICCA, PROCEEDINGS OF THE TWELFTH INTERNATIONAL ARBITRATION CONGRESS 223 (1994); Paul Friedland, *Arbitration under the AAA's Rules*, 6 ARB. INT'L 301 (1990); Michael F. Hoellering, *AAA Administration of International Arbitration Proceedings*, 13 ICSID REV.—FOR. INVEST. L.J. 51 (1998); Michael F. Hoellering, *How to Draft an AAA Arbitration Clause for International Business*, 47 ARB. J. 44 (1992); Michael F. Hoellering, *International Arbitration Under U.S. Law and AAA Rules*, 50 DISP. RES. J. 25 (1995); Michael F. Hoellering & Bette E. Shifman, *American Arbitration Association*, in WORLD ARB. REP. 5647 (1989); Francoise Joly, *Le Règlement d'Arbitrage International de l'Association Américaine d'Arbitrage*, 1993 REV. ARB. 401; Robert Meade, *Arbitration Overview: The AAA's Role in Domestic and International Arbitration*, 1 J. INT'L ARB. 263 (1984).

134. See AAA Center Administers its 1000th International Case, 10 WORLD ARB. & MED. REP. 149 (1999).

135. See AAA Will Open International Center for Dispute Resolution in Dublin, 12 WORLD ARB. & MED. REP. 177 (2001).

136. See W. CRAIG ET AL., INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION (3d ed. 1999); INTERNATIONAL CHAMBER OF COMMERCE, INTERNATIONAL ARBITRATION, SIXTY YEARS OF ICC ARBITRATION: A LOOK AT THE FUTURE (1984); Jean-Jacques Arnaldez, *Un Centre International: La Chambre de Commerce Internationale*, 1980 REV. ARB. 249; Leonard B. Bannicke, *International Chamber of Commerce Court of Arbitration*, 23 ALBERTA L. REV. 51 (1985); André Boissier & René Arnaud, *Court of Arbitration of the International Chamber of Commerce*, 3 ARB. J. 109 (1939); Jean-François Bourque, *l'Expérience du Centre International d'Expertise de la CCI et le Développement de l'Expertise Internationale*, 1995 REV. ARB. 231; Yves Déraíns, *International Chamber of Commerce Arbitration*, 5 PACE L. REV. 591 (1985); Yves Déraíns, *The Future of ICC Arbitration*, 14 J. INT'L L. & ECON. 437 (1980); Michel Gaudet, *The International Chamber of Commerce Court of Arbitration*, 4 INT'L TAX & BUS. LAW. 213 (1986); Samuel V. Goekjian, *ICC Arbitration from a Practitioner's Perspective*, 14 J. INT'L L. & ECON. 407 (1980); Richard J. Graving, *The International Arbitration Institutions: How Good a Job Are They Doing?*, 4 AM. UNIV. J. INT'L L. & POL. 319 (1989); Tila Maria de Hancock, *The ICC Court*

in Paris, France, is the most well-established and well-known international arbitral institution. Despite recent attempts to lower costs,¹³⁷ ICC arbitration remains the most expensive form of transborder arbitration. The ICC provides highly professional arbitration services. Given its long-standing presence in the field, some international lawyers (with or without ties to the ICC) maintain that ICC arbitral awards have greater credibility before national courts than awards from other arbitral institutions. They believe that a stronger presumption of enforceability attaches to ICC awards on a worldwide basis. Be that as it may, the ICC has administered more than 5,000 arbitrations since the late 1920s.¹³⁸ It administers approximately 500 arbitrations annually, and usually these arbitrations represent very significant cases in terms of the amount in dispute and the stature of the parties.

The London Court of International Arbitration (LCIA)¹³⁹ is also an important entity in the provision of arbitration services to international commercial parties. It, too, is an experienced service-provider and benefits from an impeccable professional reputation. Because it charges an hourly rate rather than a fee based on a percentage of the amount in controversy,¹⁴⁰ LCIA arbitration is much less expensive than ICC arbitration. The LCIA, however, does less business than the ICC—approximately, 150 cases per year.¹⁴¹ The LCIA Rules of Arbitration are more accessible than their ICC counterpart, which seems to be mired in the *franglais* foibles of French-to-English translation and composition. Historically, among international lawyers, LCIA arbitration has been perceived as English arbitration and linked to English court supervision of the merits of arbitral awards. The organization added “international” to its corporate title and created a number of regional councils throughout the world to alter this perception. That effort, however, has met with

of Arbitration: *The Institution and Its Procedures*, 1 J. INT'L ARB. 21 (1984); Jan Paulsson, *The Contemporary Role of ICC Arbitration in Resolving International Business Disputes*, 9 INT'L TRADE L. & PRAC. 323 (1983); Eric A. Schwartz, *Arbitration Under the Rules of the International Chamber of Commerce*, 1993 ARB. & DISP. RES. L. J. 130; J. Gettis Wetter, *The Present Status of the International Court of Arbitration of the ICC: An Appraisal*, 1 AM. REV. INT'L ARB. 91 (1990).

137. See Stephen Bond, *The 1986 Reform of ICC's Practice Relating to Costs and Payments*, 2 ARB. INT'L 358 (1986).

138. Lecture by Lorraine Brennan, North American Director, ICC Court of Arbitration, July 30, 2002, McGill University Law Faculty.

139. See HANDBOOK OF ARBITRATION PRACTICE (R. Bernstein & D. Woods eds., 2d ed. 1993); W. Lawrence Craig, *Rules of the London Court of International Arbitration*, 55 ARBITRATION 33 (1989); Delvolvé, *La Centenaire de la LCIA*, 1993 REV. ARB. 599; Sir Michael Kerr, *London Court of International Arbitration 1892-1992*, 8 ARB. INT'L 317 (1992); S. W. Lebedev, *The LCIA Rules for International Commercial Arbitration*, 8 ARB. INT'L 321 (1992); Kenneth S. Rokison, *The London Court of International Arbitration*, 55 ARBITRATION 96 (1989).

140. See Brennan, *supra* note 138.

141. See CARBONNEAU, *LAW AND PRACTICE*, *supra* note 1, at 33-34.

only modest success. The 1996 UK Arbitration Act, like its predecessor in 1979,¹⁴² improved England's standing as a venue for transborder arbitration. The further liberalization of English law accompanied by the tempering of English court supervision of awards have made LCIA arbitration more attractive to commercial parties and given the LCIA a more noticeable presence in the world marketplace for arbitration services.

Also, there are a number of specialized forms of transborder institutional arbitration. The International Centre for the Settlement of Investment Disputes (ICSID) administers arbitrations that involve disputes between private investors and host states.¹⁴³ The objective of ICSID or World Bank arbitration is to provide a mechanism by which to reduce the impact of sovereign status upon international investments.¹⁴⁴ ICSID's internal appeal mechanism and other issues, however, rendered the process ineffective for a time. Only a handful of cases (approximately thirty) were brought to the ICSID in some thirty-five years of operation.¹⁴⁵ The reference to ICSID arbitration in the NAFTA Treaty and in bilateral trade agreements revitalized the process. The ICSID Secretariat reports that it currently has in excess of sixty pending cases with many more filings.¹⁴⁶ ICSID administrators are aware of the rebirth of their process and are seeking to rival the ICC in terms of transnational prominence. Sovereignty, however, can be an obdurate and uncompromising barrier that will not necessarily yield to the needs and objectives of international commerce.

WIPO arbitration¹⁴⁷—arbitrations which involve intellectual property disputes performed through the auspices of the World Intellectual Property Organization—constitutes another specialized form of arbitration. Despite its direct relevance to globalization and the technological revolution, WIPO arbitration had not flourished as a form of transborder arbitration. It began to do a volume of business only when ICANN designated the WIPO as an arbitration service provider for domain name disputes.¹⁴⁸ Additionally, a number of local chambers of commerce

142. See CARBONNEAU, *LAW AND PRACTICE*, *supra* note 1, at 953-1035; see also Donaldson, *The 1979 Arbitration Act*, 45 *ARBITRATION* 147 (1979); Elland & Goldsmith, *The Arbitration Act 1979*, 6 *INT'L L. & PRAC.* 63 (1980).

143. Aron Broches, *l'Évolution du C.I.R.D.I.*, 1979 *REV. ARB.* 323; Delaume, *ICSID Arbitration*, in *CONTEMPORARY PROBLEMS IN INTERNATIONAL ARBITRATION* 23 (J.D.M. Lew ed., 1986); Paul Szász, *Arbitration Under the Auspices of the World Bank*, 3 *INT'L LAW.* 312 (1969); see also M. HIRSCH, *THE ARBITRATION MECHANISM OF THE INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES* (1993). See generally SMIT & PECHOTA, *BIBLIOGRAPHY*, *supra* note 14, at 91-99.

144. See generally SMIT & PECHOTA, *BIBLIOGRAPHY*, *supra* note 14, at 91-99.

145. See *id.*

146. See generally 9 *WORLD ARB. & MED. REP.* 150 (1998).

147. See generally SMIT & PECHOTA, *BIBLIOGRAPHY*, *supra* note 14, at 120-21.

148. See generally 11 *WORLD ARB. & MED. REP.* 71 (2000).

administer transborder arbitrations. The Zurich Chamber of Commerce,¹⁴⁹ for example, has its own set of arbitration rules and actively seeks to administer arbitral proceedings. The Stockholm Chamber of Commerce¹⁵⁰ is another case in point, illustrating both the function and adaptability of these organizations.

During the cold war era, Sweden played a vital role in ICA by acting as the principal center for holding East-West arbitrations.¹⁵¹ In fact, a sophisticated group of lawyers and other experts had developed in Stockholm to address the special problems associated with these arbitrations. When the cold war ended and China developed CIETAC arbitration,¹⁵² the need for a venue specializing in East-West arbitrations was diminished considerably. In 1999, the Swedish Parliament enacted the Swedish Arbitration Act¹⁵³ to modernize the Swedish law of arbitration and to sustain and redirect Sweden's reputation as an attractive venue for international arbitrations. The enactment of the law demonstrated that Sweden was attempting to find its role in the refashioned international commercial order.

The Swedish Arbitration Institute (the "Institute") revised its arbitration rules in light of the new law. The Institute was established in 1949 and is part of the Stockholm Chamber of Commerce, and participates in a long tradition of Swedish arbitration. It is a very active arbitral institution, receiving more than 120 new cases in 1998.¹⁵⁴ The revision of the rules is not radical in character; the rules came into force in 1988 and exemplified a modern regulation of arbitration. The amendments reinforce the objective of achieving procedural economy and flexibility. For example, the stated time-limit for the rendition of an award has been reduced from one year to six months.¹⁵⁵ The time-limit begins to run from the date of the arbitral tribunal's constitution. The Institute can grant extensions.¹⁵⁶ While the shortened time-limit is unrealistic for complex arbitrations, it does symbolize the Institute's commitment to expedited dispute resolution through arbitration. The revised rules also authorize arbitrators to issue interim awards for the production of evidence and to secure the enforcement of final awards.¹⁵⁷ While such measures are subject to judicial enforcement, their availability makes

149. See generally SMIT & PECHOTA, BIBLIOGRAPHY, *supra* note 14, at 148.

150. See generally SMIT & PECHOTA, BIBLIOGRAPHY, *supra* note 14, at 134-35.

151. The author adapted the following commentary and description from his previous work. See CARBONNEAU, LAW AND PRACTICE, *supra* note 1, at 1038-40.

152. See *supra* note 81 and accompanying text.

153. See Sigvard Jarvin, *La Nouvelle Loi Suédoise sur l'Arbitrage*, 2000 REV. ARB. 27.

154. See generally 10 WORLD ARB. & MED. REP. 154 (1999).

155. See *id.*

156. See *id.*

157. See *id.*

clear that Institute rules are meant to foster the effectiveness of arbitration.

The revised rules also emphasize the international character of non-domestic arbitration. For example, when the parties to an international arbitration do not provide for a law governing the merits, the Institute rules state that the arbitral tribunal can choose to apply a specific national law or "rules of law" it finds suitable.¹⁵⁸ The latter category can include transborder laws like The United Nations Convention on Contracts for the International Sale of Goods (CISG),¹⁵⁹ the UNIDROIT "Principles of International Commercial Contracts,"¹⁶⁰ or the *lex mercatoria arbitralis*.¹⁶¹ This is a particularly significant emendation and represents a strong position in favor of arbitral autonomy and arbitrator authority.

Finally, the revised Institute rules have altered the manner in which arbitrator compensation is determined. The prior practice allowed the arbitral tribunal to determine its own fees.¹⁶² In order to promote greater predictability in arbitrator fees, the revised rules provide that the fees will be set by the Institute in accordance with the amount in dispute.¹⁶³ The applicable schedule will include minimum and maximum amounts to allow the Institute to take the characteristics of the particular arbitration into account. Arbitrator fees will be paid at the outset of the proceedings, along with administrative fees.

The issue of arbitrator fees has become a problematic aspect of the business of transborder arbitration.¹⁶⁴ It is generally known that the going rate for ICC and other international arbitrators is (US) \$600/hour or (US) \$5,000/day. It is also generally acknowledged that it is very difficult to break into the group of international arbitrators and that the

158. *See id.*

159. The United Nations Convention on Contracts for the International Sale of Goods (CISG) (April 11, 1980), U.N. Doc. A/CONF 97/18, *reprinted in* 19 I.L.M. 671 (1980).

160. INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW ("UNIDROIT"), PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (1994) [hereinafter UNIDROIT Principles]. *See* Michael Joachim Bonell, *UNIDROIT Principles and the Lex Mercatoria*, in THOMAS E. CARBONNEAU, *LEX MERCATORIA AND ARBITRATION*, *supra* note 4, at 249.

161. *See generally* THOMAS E. CARBONNEAU, *LEX MERCATORIA AND ARBITRATION*, *supra* note 4.

162. *See id.*

163. *See id.*

164. *See* Jacques Werner, *Remuneration of Arbitrators by the International Chamber of Commerce*, 5 J. INT'L ARB. 135 (1988). *See also* Alan W. Shilston, *The Evolution of Modern Commercial Arbitration*, 4 J. INT'L ARB. 45 (1987); Hans Smit, *The Future of International Commercial Arbitration*, 2 WEST'S INT'L L. BULL. 5 (1984); John Uff, *Cost-Effective Arbitration*, 59 ARBITRATION 31 (1993). *See generally* M. O'REILLY, *COSTS IN ARBITRATION PROCEEDINGS* (1995). *See also* John Yukio Gotanda, *Setting Arbitrators' Fees: An International Survey*, 33 VAND. J. TRANSNAT'L L. 779 (2000).

contract of appointment is the only source of arbitrator certification other than the arbitrators' professional activity and training. The "clubbish" atmosphere and the insularity of the group already detract from the legitimacy of the process. The enormous fees that can be commanded by international arbitrators place further pressure on the process. Arbitrators, unregulated except by contract, develop a monetary self-interest that can conflict with both the ethical and practical operation of the process. The exorbitant fees also could eventually deter commercial parties from having recourse to the arbitral process. The Swedish Institute's regulation of this aspect of the process—separate from the contract, the parties, and the arbitrators—appears to be a step in the right direction.

THE NEED FOR UNIFORMITY

Certain aspects of ICA's development have parallels in the elaboration of the domestic United States' law of arbitration. For example, both forms of arbitration have demonstrated a critical need for uniformity in their governing legal provisions. Uniformity was achieved in the domestic United States arbitration law through federalization. Beginning with *Prima Paint*,¹⁶⁵ continuing into the second trilogy cases (*Moses Cone*,¹⁶⁶ *Keating*,¹⁶⁷ and *Byrd*),¹⁶⁸ and ending with the opinion in *Terminix v. Dobson*¹⁶⁹ (all of this development being prophetically announced years earlier by Judge Medina in *Robert Lawrence*),¹⁷⁰ it became clear that the United States Federal Arbitration Act (FAA)¹⁷¹ was the governing law of arbitration in the United States. In these landmark cases, the United States Supreme Court decided that federal courts sitting in diversity were, despite the *Erie* doctrine,¹⁷² bound to apply the FAA, that state court decisions also were subject to the FAA, and that state legislatures could not deviate from the provisions and principles of the FAA in enacting regulatory frameworks that applied directly or indirectly to arbitration.¹⁷³ As long as interstate commerce was somehow implicated, a suitable jurisdictional basis existed for the application of federal law and the FAA would govern. "[S]tate law to the contrary"¹⁷⁴ was preempted by the Supremacy Clause of the United States Constitution.

165. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967).

166. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Co.*, 460 U.S. 1 (1982).

167. *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

168. *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213 (1985).

169. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995).

170. *Robert Lawrence Co. v. Devonshire Fabric, Inc.*, 271 F.2d 402 (2d Cir. 1959).

171. 9 U.S.C. §§ 1-16 (2000).

172. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

173. See CARBONNEAU, LAW AND PRACTICE, *supra* note 1, at 121-98.

174. See *Dobson*, 513 U.S. at 272-73, 280.

The federal preemption doctrine made it possible to elaborate a uniform American law of arbitration. The Court pursued the federalization policy as single-mindedly as it would later seek to protect arbitration agreements from challenges based on matters of contract formation. Rightly or wrongly, the Court endeavored to elaborate a law free of the wrinkle of exceptions. It seemed to believe that, once established, exceptions would eventually come to rule the legal propositions from which they emerged and would invite ever more litigation—in this setting, about the operation of a framework meant to curtail the volume of judicial adjudication. No economy of judicial resources would be achieved and access to adjudication would be reduced by the burdensome character of the process. Despite its susceptibility to criticism, there was undeniable wisdom in the Court's position. The dynamic of judicial decision-making tends to seek exceptions to general propositions. Once elaborated, these exceptions take on a life of their own and, almost inevitably, engulf the rule from which they emerged. This is true even in the decisional law of highly-regarded courts. The grounds for achieving the vacatur of awards illustrates the problem.¹⁷⁵

The text of section 10 of the FAA¹⁷⁶ eliminates, by implication, the possibility that arbitral awards can be subject to judicial review on the merits for purposes of vacatur or confirmation. The statutory grounds listed in section 10 restrict the judicial supervision of awards to circumstances in which the proceeding that gave rise to the award was corrupted by outside influences, arbitrator abuse of authority, or resulted in a failure of basic fairness (notice and an opportunity to be heard). Because of an apparent inability to distinguish between labor and commercial arbitration, the courts in their decisional law added several non-statutory grounds to the foregoing list. These grounds all involved vacating awards for errors made by labor arbitrators in applying the law of the labor agreement (the collective bargaining agreement) or of the workplace or for misassessing the record of the matter.¹⁷⁷ The strong presumption of enforceability that attached to arbitral awards through the statute now had two types of exceptions—statutorily-established and common-law grounds. Moreover, the integration of the common-law grounds into the statutory framework had the effect eventually of allowing courts to revisit the merits of the case and to reverse the award on the basis of the court's disagreement with the arbitrator's application of law or reasoning on the law. In a word, the incorporation of com-

175. The foregoing analysis relies on CARBONNEAU, *LAW AND PRACTICE*, *supra* note 1, at 121-98.

176. The foregoing analysis relies on CARBONNEAU, *LAW AND PRACTICE*, *supra* note 1, at 489-536.

177. *See id.* at 499-516.

mon-law exceptions conflicted with the statute by allowing courts to engage in a merits review of awards—a process forbidden by the enacted legislation. Although the judicial policy favoring arbitration minimized the possibility that the merits review of awards would ever become the standard practice, cases appeared in which court disagreement with the arbitrator's disposition of the matter resulted in the vacatur of the award.¹⁷⁸ The development of such accidents explains, to some degree, the Court's unwillingness to tolerate exceptions to the basic principles of its arbitration doctrine.

World courts achieved the same degree of uniformity in ICA under a different name. "Internationalization" performed the function that "federalization" had satisfied in the domestic law of arbitration. Internationalization, in effect, created a unitary law for ICA among the highly diverse countries and legal systems of the world community. This single standard approach blocked the creation of national legal obstacles to ICA and made "a-national" or non-national-law-controlled arbitration a reality.¹⁷⁹ In effect, it prevented the erosion of ICA by eliminating national law variations and legal disparities. Unitary rules, implemented by courts with the discipline of consistency and predictability, appeared to be necessary to arbitral systems in both the transborder and domestic level.

IMPACT ON NATIONAL LAW

The creation and establishment of a system of ICA has had a number of consequences upon domestic legal systems. Representing a progressive use of law to accomplish practical ends, ICA filled a void where the ordinary process of legality, paralyzed by conflicts, had failed to provide any solution. In terms of municipal court activity, the implications were several.¹⁸⁰ Court dockets would include fewer litigations involving international transactions. Choice-of-law or conflicts analysis would play a far lesser role in this area of dispute resolution. Arbitrators, in general, would probably be less concerned than judges about the flawless selection of the governing law and the correct application and interpretation of its provisions. Moreover, arbitrator determinations were private rulings and ordinarily memorialized sparingly in scant legal reasoning. As support for ICA grew, the central focus of international litigation before municipal courts was altered. It was no longer devoted to *renvoi*, proof of foreign law, discovery conducted abroad, the extra-territorial assertion of judicial jurisdiction, and the enforcement of for-

178. *See id.*

179. *See infra* text accompanying notes 182-83.

180. The following analysis relies on CARBONNEAU, LAW AND PRACTICE, *supra* note 1, at 2-5.

eign judgments. Rather, the preoccupation shifted to the enforcement of international arbitral agreements and awards. To a large extent, legalistic considerations ceded their dominant position in the adjudicatory hierarchy to arbitration and the provision of workable business solutions. Arbitration agreements eliminated the possible conflict of jurisdictions; arbitrator discretion minimized the possible conflict of laws; and the enforcement framework under the New York Arbitration Convention¹⁸¹ dispelled possible conflicts of judgments.

National law itself appeared to play a very subdued role in the process of transborder arbitration. Under the theory of "a-national" arbitration,¹⁸² noted above,¹⁸³ courts at all stages of the arbitral process would apply transnational norms exclusively in their supervision of transborder arbitral agreements, proceedings, and awards. The local law of arbitration (the *lex loci arbitri*) had no impact upon the process except to the extent that its provisions coincided with the transnational norms on arbitration and could have a positive bearing on the process. Those transnational norms greatly favored the arbitral process and its operation. They established a nearly irrebuttable presumption of enforceability in all matters affecting transborder arbitration. Moreover, national courts were expected to use their authority exclusively to assist (and not to hinder) the conduct of international arbitral proceedings and to achieve the enforcement of awards. The situs for the arbitration is usually selected because it is neutral as to the parties and the transaction that underlies the dispute. The application of non-local legal standards in such circumstances is understandable and rationally justified.

The tenets of "a-national" arbitration, nevertheless, further require that courts at the place of enforcement also apply transnational norms on arbitration. In these circumstances, the award—unlike the arbitral proceeding—will (if enforced) become a legally-binding determination in the place of enforcement and will have an economic impact upon a resident or citizen of the requested jurisdiction. "A-national" arbitration, therefore, mandates a complete sublimation of the national law and interest to the necessary discipline for arbitration in order for the state to reap the long-term benefits of the international arbitral process.

LAW AND LEGITIMACY

Generally, the type of justice that is available in ICA is not the elaborate form of "designer justice" that applies in domestic United

181. See *supra* note 14 and accompanying text.

182. The following analysis relies on CARBONNEAU, *LAW AND PRACTICE*, *supra* note 1, at 22-24. See also Hans Smit, *A-National Arbitration*, 63 *TUL. L. REV.* 629 (1989).

183. See *supra* text accompanying note 179.

States' legal proceedings. Rights protection, procedural sophistication, and an uncompromising commitment to due process are not the hallmarks of ICA. In fact, "designer justice" and the complex conflicts that attend the operation of the legal process are some of the principal reasons for the success of non-judicial adjudicatory processes like arbitration. Protracted proceedings and the expense of litigation have made judicial justice inaccessible. In ICA, functionality is the foremost objective along with finality and basic fairness. Rights protection does not supercede these objectives. ICA, however, is neither a simplistic nor an arbitrary process. It is not "justice under a tree." Succinctly stated, ICA (like its domestic counterpart) is a process of adjudication that is accessible, expert, reasonably fair, and professional—the results of which are enforceable. In the international context, it is important to note further that ICA is neutral as to nationality and legal tradition. ICA is the product of party choice, of the parties' exercise of their freedom of contract. In an imperfect and difficult world, it is a realistic and meaningful alternative which provides a remedy where one would not otherwise be available.

What role, if any, does the law play in regard to ICA—its operations, and its adjudicatory determinations? At a domestic level, law embodies social and political forces that invest public institutions with authority and legitimacy. It acquires its legitimating function from its origins in democratic processes established by the originating political framework. In the international setting, law does not arise from the same source, have the same content, or perform the same functions. International law is not domestic law and vice versa. The lack of equivalency does not debilitate or detract from either form of law. Domestic law and its foundation in democratic values are not the be-all and end-all of law. International law can stand on its own as law.

In the international arena, no political state in the domestic sense exists; authority vests in a group of "equal" sovereigns. Law internationally often arises from customary practices or the development of a consensus view among states. There is a great deal of fluidity and indefiniteness about international law-making. It is more *de lege ferenda* than *lex*. International agreements and treaties often have an aspirational (rather than rule-making) quality. The dictates of sovereignty dilute both the statutory and decisional rule of law. The civilizing influence of law often is secondary to the prospective and actual use of force in state-to-state relations. Acceptance of a practice by powerful states often amounts to the conferral of legitimacy. Majoritarian rule is not the guiding principle. Politics and power are the more usual watchwords of international relations.

National law rules could be used to regulate ICA according to a rigorous domestic policy. The implementation of such a regime would represent a return to a bygone era of legal hostility to arbitration. Statutory provisions and court rulings would become vehicles for imposing restraints on the ICA process. Such restrictions could be selective or comprehensive, and could contain a wide variety of grounds and express numerous policy objectives. The regulations would not exist to consecrate the parties' right to engage in arbitration, but rather to make clear that the provision of adjudicatory services is a state function and prerogative. Only the state can derogate from its own authority and responsibilities in the area. The purpose of legislation on arbitration would be to regulate the limited incursion arbitration can make into the state's privileged domain. Such a regime would probably include a statutory statement on subject matter inarbitrability, articulate a more aggressive policy on the judicial supervision of awards, and restrict arbitration's scope of application. Domestic law would surrender none of its real authority to the private process. ICA would function through and for the benefit of domestic law. Present-day realities preclude such a regulatory approach to arbitration. A highly restrictive policy is both impractical and impolitic. A departure from the highly tolerant and liberalist trans-border regulation of ICA is unlikely to be achieved simply through a radical reversal of position.

Domestic law does not invest the process of ICA with legitimacy. There is an interface with domestic law for purposes of gaining assistance for arbitral tribunals and proceedings, establishing decisional predicates, and pursuing the coercive enforcement of awards. A national statute on arbitration usually recognizes and upholds ICA and governs a number of other matters that relate to the ICA process: (1) the capacity of the parties to contract (and, relatedly, of arbitrators to act as arbitrators); (2) the validity (and enforceability) of arbitration agreements; (3) the relationship between the court system and the arbitral process (in terms of attachment or other forms of interim relief, the appointment of arbitrators, compelling parties to arbitrate or to cooperate with the process, and the like); and (4) the judicial supervision of awards in the event of noncompliance (grounds for confirmation or vacatur, severance and partial confirmation of awards, resubmission of defective awards to the arbitral tribunal, enforcement and non-enforcement).

Domestic law, therefore, hardly drives ICA. The description of "a-national" arbitration¹⁸⁴ makes clear that national law does not provide ICA with its doctrinal anchor. The legal foundation for ICA arises from a universal principle of private law: freedom of contract (party auton-

184. See *supra* text accompanying notes 182-83.

omy for civil law lawyers). According to landmark court decisions, international instruments, statutory provisions, and institutional rules, the contracting parties have a nearly unqualified right to engage in arbitration and to establish the modalities of their arbitration. The United States Supreme Court is fond of stating that courts “enforce arbitration agreements as they are written.”¹⁸⁵ It also intones with equal frequency the view that a particular arbitration is a “one-off” event devoid of larger systemic consequences.¹⁸⁶ In other words, there is no need for a rule of law where contract controls and privatizes all aspects of the dispute resolution process. By emphasizing the sovereignty of contract rights and the self-contained character of arbitration, the Court suggests that statutory frameworks, transnational or otherwise, are merely “default” vehicles that fill gaps when party agreement is absent, unclear, or impossible to secure.

Law in ICA, therefore, is the universal law of contract. There also is law-making in arbitration from a *stare decisis* or *jurisprudence établie* perspective. Arbitral rulings yield legal principles or rules that can be applied as controlling in subsequent arbitrations. International arbitrators not only adjudicate, but they also can and do make law—a *lex mercatoria arbitralis*.¹⁸⁷ Moreover, practices pertaining to the regulation of arbitration and the conduct of arbitral proceedings have been codified in the UNCITRAL model framework. The Model Law and the Model Rules, as noted earlier,¹⁸⁸ reflect a general world consensus regarding the essential principles of arbitration law and of the rules pertaining to the arbitral trial.

A *laissez-faire* state policy in conjunction with universal contract law principles and the codification of basic regulatory principles through international instruments constitute the legal foundation for the process of ICA. These elements coincide with the development of “a-national” arbitration and the law-making function of international arbitrators. The autonomy of the contracting parties is so strong as a controlling proposition that some national courts permit the parties to agree to their own standard of judicial review for awards.¹⁸⁹ The party choice may conflict with an otherwise governing statutory standard, but some courts will enforce it nonetheless. While this position has been criticized and has

185. See, e.g., *Volt Info. Scis., Inc. v. Stanford Univ.*, 489 U.S. 468 (1989).

186. See, e.g., *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220 (1987).

187. See *supra* note 4 and accompanying text.

188. See *supra* note 15 and accompanying text.

189. For a description and discussion of the so-called opt-in provisions for judicial review, see CARBONNEAU, LAW AND PRACTICE, *supra* note 1, at 219-24.

divided ruling courts,¹⁹⁰ when applied, it makes the governing statute into a default framework. The enforcement of awards nullified at the place of rendition is another illustration of the perfunctory status of national law in ICA.¹⁹¹ Courts in both France and the United States have enforced awards set aside at the place of rendition.¹⁹² Again, despite its controversial character, this decisional law demonstrates that national law is subservient to the transborder norms that attach to the ICA process. The enforceability of awards trumps the integrity and authority of national legal processes.

INDETERMINANT EMBRYONIC RULES

ICA represents a functional adjudicatory process for the resolution of civil, commercial, and even regulatory disputes that arise in international commercial transactions. ICA is not a static process. Its design and operation are not etched in stone. It tolerates adjustments. In fact, as the process grows and develops, its gravamen should be revisited.

While autonomy and independence remain instrumental to the process, current statutory and decisional-rule predicates are characterized by an inadequacy of content. They simply do not provide a sufficient response to the growing complexity of the process. Rules can be, have been, and are adjusted, expanded, narrowed, and sometimes mutilated to provide governing propositions for practical circumstances. The content of existing rules explodes and their structure shatters when they are applied to the issues that surface currently in the process. Because they have not been adapted to arbitration's expanded scope of application and growing significance, the rules of present-day arbitration law are merely embryonic statements of a possible regulatory predicate. Two examples from contemporary law illustrate the point.

First, the indeterminacy of the rules of contemporary arbitration law is illustrated by the history and present-day application of the "manifest disregard of the law" ground for the vacatur of arbitral awards.¹⁹³ This provision could affect an international arbitral award in a setting aside action under Article V of the New York Arbitration Convention.¹⁹⁴ The very origins of the rule are murky and unsettled. It is the received wisdom among courts and commentators that "manifest disregard" first appeared in *Wilko v. Swan*¹⁹⁵ when the Court stated: "In unrestricted

190. See, e.g., *Chicago Typographical Union v. Chicago Sun-Times, Inc.*, 935 F.2d 1501 (7th Cir. 1991).

191. See *supra* notes 112-14 and accompanying text.

192. *Id.*

193. See CARBONNEAU, LAW AND PRACTICE, *supra* note 1, at 509-16.

194. See *Yosuf Ahmed Alghamin & Sons v. Toys "R" Us, Inc.*, 126 F.3d 15 (2d Cir. 1997).

195. *Wilko v. Swan*, 346 U.S. 427 (1953).

submissions, such as the present margin agreements envisage, the interpretations of the law by the arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation.”¹⁹⁶ This delphic pronouncement is generally acknowledged to constitute the first trace of the expression.¹⁹⁷

Thematically, given its content, the expression appears to fit into and make sense principally (perhaps exclusively) in the context of labor arbitration. In fact, “manifest disregard of the law” appears to have actually originated there and to have been a means by which courts could police a labor arbitrator’s fidelity to the provisions of the collective bargaining agreement (CBA). The case law on labor arbitration makes clear that the CBA constitutes the law for the workplace and is often referred to by parties and courts as the contract.¹⁹⁸ Labor arbitrators are required to stay within the four corners of the CBA, and are not authorized “to dispense [their] own brand of industrial justice”: “[their] award[s] [are] legitimate only as long as [they] draw [their] essence from the collective bargaining agreement.”¹⁹⁹

In this setting, manifest disregard of the law meant that the labor arbitrator had gone beyond the CBA or contract, and attempted “to dispense his own brand of industrial justice.”²⁰⁰ Such a situation did not arise frequently. Labor arbitrators have a rather wide latitude of interpretation because “the industrial common law—the practices of the industry and the shop—is equally a part of the collective bargaining agreement although [it is] not expressed in it.”²⁰¹ The regulatory provisions governing labor arbitration, however, needed to establish clearly the point at which the arbitrator ceased to exercise legitimate authority. The process of industrial self-governance could not tolerate individually-created, capricious, or irrational labor arbitrator determinations that had no bearing to the CBA or relationship with the law of the shop.

In addition, the federal circuits were split on whether “manifest disregard of the law” was part of the law of the individual circuits. The ground is recognized in the District of Columbia, the First, Second, Sixth, Ninth, and Tenth Circuits.²⁰² As noted earlier,²⁰³ it is a common-law ground for vacatur grafted onto the FAA by court construction—“a

196. *Id.* at 436-37.

197. *See* *Rodriguez v. Prudential-Bache Secs., Inc.*, 882 F. Supp. 1202, 1209 (D.P.R. 1995).

198. *See* *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960).

199. *See* *United Steelworkers of Am. v. Enter. Wheel and Car Corp.*, 363 U.S. 593 (1960).

200. *Id.*

201. *See* *Warrior & Gulf Navigation Co.*, 363 U.S. at 574.

202. *See* I. MACNEIL ET AL., *FEDERAL ARBITRATION LAW, Agreements, Awards, and Remedies under the Federal Arbitration Act*, §§ 40.7.1, 40:83 (Supp. 1999).

203. *See supra* text accompanying notes 176-78.

judicially created standard for vacating an arbitration award”²⁰⁴ It permits the otherwise unlawful review of the merits of awards. It was recently expanded by the Second Circuit to include arbitrator disregard of the facts and evidence presented, thereby allowing it to act as an even broader basis for the judicial supervision of the merits of awards.²⁰⁵

Despite its notoriety in the area, there is little agreement among courts as to what the phrase means or when it is to be implemented. Some courts assert that it cannot be applied without finding a breach of a statutory ground;²⁰⁶ others contend that it can only be applied when arbitrators issue reasons with their awards;²⁰⁷ yet other courts maintain variously that it requires clear arbitrator recognition of the applicable law,²⁰⁸ a determination by the arbitrator that the law is applicable and clear,²⁰⁹ or that there be a legal error that is discoverable and evident to the “average reasonable arbitrator” (“capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator”).²¹⁰ Also, “[t]he governing-law alleged to have been ignored by the arbitrators must be well defined, explicit, and clearly applicable.”²¹¹ Despite the “thickness” of its doctrinal fabric,²¹² courts generally conclude (somewhat ironically) that vacatur on this basis should be rare: “Judicial inquiry under the ‘manifest disregard’ standard is . . . extremely limited We are not at liberty to set aside an arbitration panel’s award because of an arguable difference regarding the meaning or applicability of laws urged upon it”²¹³ Finally, one court has deemed the formulation to be empty rhetoric: “We understand neither the need for the formula nor the role it plays in judicial review of arbitration (we suspect none—that it is just words).”²¹⁴

The current rule, therefore, is a patchwork of interpretations and shifting applications of the doctrine. There is uncertainty about whether the rule should continue to exist and what its function is, might be, or ought to be. There is some speculation that it could find a new vocation by allowing the courts to supervise arbitrator determinations on statutory claims, especially in domestic employment matters that implicate civil

204. *Fine v. Bear, Stearns & Co.*, 765 F. Supp. 824, 827 (S.D.N.Y. 1991).

205. *Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197 (2d Cir. 1998).

206. *See Barbier v. Shearson Lehman Hutton, Inc.*, 948 F.2d 117, 120 (2d Cir. 1991).

207. *See Rodriguez v. Prudential-Bache Secs., Inc.*, 882 F. Supp. 1202, 1209 (D.P.R. 1995).

208. *Id.*

209. *Id.*

210. *See Fine v. Bear, Stearns & Co.*, 765 F. Supp. 824, 827 (S.D.N.Y. 1991).

211. *Id.*

212. *Id.*

213. *See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930, 934 (2d Cir. 1986).

214. *See Baravati v. Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704, 706 (7th Cir. 1994).

rights.²¹⁵ In any event, as it operates currently, the rule provides little guidance and predictability. It does present the prospect of surprise or of further mutations in content and application. If misapplied, it could wreak havoc with the autonomy of arbitral determinations and awards.

Second, more germane to ICA, the crucial issue of the role of sovereign status in arbitration remains largely unsettled. There is a hodgepodge of decisional and statutory positions, but no clearly enforceable rule that would close the transactional "black hole" left open by sovereign immunity. An indirect answer to the sovereignty question is contained in the long-standing legal doctrines of assumption of risk and *caveat emptor*. If a party entered into dealings with a sovereign entity, it did so knowingly and at its own peril. If the exercise of sovereign discretion left the party completely in the lurch, it could blame no one but itself. The ICSID framework²¹⁶ attempts to attenuate the harshness of that rule and result. There is, however, no guarantee available but for an abstract undertaking in a treaty that applies to the enforcement of an ICSID award. As noted earlier,²¹⁷ NAFTA provides the most effective discipline of sovereign positions when private parties complain about sovereign behavior. In the United States, legislators endeavored to fashion some domestic statutory answers to the problem of sovereignty. They incorporated them into the domestic law on arbitration and other related legislation.²¹⁸ These solutions, however, are not a comprehensive answer to the multiple issues raised by the problem.

In 1988, in response to a number of court rulings, the United States Congress modified the impact of sovereignty upon the enforcement of international arbitration awards. To achieve its objective, Congress enacted legislation which amended the Foreign Sovereign Immunities Act of 1976 (FSIA) as well as the FAA.²¹⁹ The language of the amendments diminished, to some degree, the likelihood that sovereign status could be used in certain circumstances to block the enforcement of arbitral awards rendered against states.

Prior to Public Law No. 100-669, under the FSIA, a party who sought to enforce an arbitral award against a state or state party could only invoke the implied waiver exception to sovereign immunity under

215. See, e.g., *Arbitrator's Error of Law Not Grounds for Reversing Award for Punitive Damages*, 8 WORLD ARB. & MED. REP. 222 (1997).

216. See *supra* text accompanying notes 143-46.

217. See *supra* text accompanying notes 32-36.

218. See text *infra* at notes 219-27.

219. See H.R. Rep. No. 100-824 (1990); 134 CONG. REC. S13966 (Sept. 26, 1988); 134 CONG. REC. H6484, H6485 (Aug. 8, 1988).

section 1605(a)(1) of the legislation.²²⁰ By agreeing to arbitrate, the state had acceded to the jurisdiction of the arbitral tribunal and thereby arguably made itself vulnerable to the eventual judicial enforcement of an arbitral award. While some courts subscribed to the latter view,²²¹ other courts took a different position. They held that "an agreement to arbitrate in an [sic] foreign country, without more, ought not to operate as a waiver of sovereign immunity in United States courts"²²² This split of position created substantial uncertainty for the contracting parties.

The enactment of Public Law No. 100-669 was intended to clarify this situation by amending the FSIA to include new section 1605(a)(6). Under that provision, states simply were not immune from the assertion of judicial jurisdiction in legal proceedings in which a party sought to enforce an arbitral agreement or award.²²³ The "arbitration exception" to state judicial immunity applied in a variety of possible circumstances: (1) when the situs of the arbitration was or was intended to be in the United States; (2) when the New York Arbitration Convention or another international accord (e.g., the ICSID Convention, the Algiers Accord, or the UNCITRAL arbitral framework) governed or could govern the arbitral agreement or award; (3) when United States courts would have had jurisdiction over the matter but for the arbitration agreement; or (4) when section 1605(a)(1) (express or implied waiver of immunity) "is otherwise applicable."²²⁴

The law also added section 15 on the act of state doctrine to the FAA.²²⁵ This provision was drafted and enacted in response to the decision in *Libyan American Oil Co. v. Socialist People's Libyan Arab*

220. See D. EPSTEIN ET AL., INTERNATIONAL LITIGATION, *The Foreign Sovereign Immunities Act*, § 7.10, at 7-67 (1998).

221. See *Transp. Wiking Trader Schiffahrtsgesellschaft MBH & Co. Kommanditgesellschaft v. Navimpex Centrala Navala*, 989 F.2d 572 (2d Cir. 1993) (stating that, when Navimpex agreed to arbitrate and actually took part in an arbitration pursuant to the agreement, "as an instrumentality or agency of the Romanian Government—a signatory to the Convention—it had to have contemplated the involvement of the courts of any of the Contracting States in an action to enforce the award").

222. See *Letelier v. Republic of Chile*, 488 F. Supp. 665 (D.D.C. 1980).

223. See H.R. Rep. No. 100-824 (1990); 134 CONG. REC. S13966 (daily ed. Sept. 26, 1988); 134 CONG. REC. H6484, H6485 (daily ed. Aug. 8, 1988); D. EPSTEIN ET AL., INTERNATIONAL LITIGATION, *The Foreign Sovereign Immunities Act*, § 7.10, at 7-67 (1998); I. MACNEIL ET AL., FEDERAL ARBITRATION LAW, *The FAA and International Arbitration*, § 44.9.7.1 (Supp. 1999).

224. See *supra* note 220. For a recent case applying the exception, see *U.S. Titan, Inc. v. Guangzhou Zhen Hua Shipping Co.*, 241 F.3d 135 (2d Cir. 2001).

225. See I. MACNEIL ET AL., FEDERAL ARBITRATION LAW, *The FAA and International Arbitration*, § 44.9.7.2 (Supp. 1999); D. EPSTEIN ET AL., INTERNATIONAL LITIGATION, *The Foreign Sovereign Immunities Act*, § 7.10, at 7-67 (1998); 134 CONG. REC. H10678 (Oct. 20, 1988), H10678; 134 CONG. REC. S13966 (Sept. 26, 1988); H.R. Rep. No. 100-824 (1990).

Jamahirya (Liamco).²²⁶ In *Liamco*, the Libyan American Oil Company had entered into an oil concession contract with the Libyan government. The contract contained an arbitration agreement. Thereafter, Libya nationalized the company's assets. The parties disagreed about how the rate of compensation should be determined; the company wanted the matter to be determined by arbitration, while Libya asserted that its nationalization statutes established the compensation rate. Moreover, Libya refused to appear in the arbitration proceeding that the company initiated regarding the dispute.²²⁷

When the company sought to enforce the award, the court ruled that the agreement to arbitrate constituted an implied waiver of sovereign immunity under section 1605(a)(1) of the FSIA.²²⁸ Therefore, the court could have commanded that the parties proceed to arbitration if the concession contract were controlling. The court, however, needed to decide the more basic issue of whether the contract or the nationalization laws governed the matter. To do so, in the court's view, required determining whether the laws were valid enactments. In the court's assessment, such a determination was precluded by the federal act of state doctrine because it involved the judicial consideration of foreign government conduct in the foreign jurisdiction.²²⁹

FAA section 15 was meant to provide a different result in such circumstances. According to a proponent of the legislation, "the *Liamco* decision indicated a need for language clarifying the intent of Congress with regard to arbitration and the act-of-state doctrine. Clearly, the act-of-state doctrine should not be used to allow a party to a commercial relationship to circumvent an agreement to arbitrate disputes."²³⁰

Despite the availability of international instruments and frameworks as well as domestic attempts to curtail the impact of sovereignty, it remains difficult to provide contracting parties with proper advice in terms of the applicable arbitral law. Section 15 of the FAA appears to provide some solution to circumstances involving acts of state, but it may not be clear what constitutes an act of state in either the general or the specific circumstances of a particular case. The *Liamco* opinion, which gave rise to the provision, is hardly transparent or persuasive on that score. Moreover, why does an act-of-state rule appear in the domestic arbitration law when it relates to international awards and why is it not part of section 10 when it deals with enforcement? The arbitration

226. 482 F. Supp. 1175 (D.D.C. 1980).

227. *Id.*

228. *Id.*

229. *Id.*

230. 134 CONG. REC. H6484, H6486 (daily ed. Aug. 8, 1988) (remarks of Mr. Fish).

exception to the FSIA is clearer in its meaning and consequences. Although it expands the breadth of attachable property to state property unconnected to the dispute, it does not fully resolve the problem of execution against state assets. Finally, it is conceivable that a court might find either provision to be an intrusion into the Commander-in-Chief powers of the Executive and a breach of separation of powers. An unequivocal rule, free of salient ambiguities, remains to be elaborated. The rule predicate here is again inapposite given the magnitude of the interests involved.

INTERNAL SOVEREIGN CONFLICTS

As ICA develops further, the law (international, domestic, or a mixture of both) may assume the task of resolving the competitive conflicts among the participants of the process. Law could eliminate such conflicts coercively and thereby stabilize the process, enhance its functionality, and contribute to its legitimacy. Competitive relationships could develop among the three major players that have a type of concurrent sovereign authority in the process: the parties, the arbitrators, and the administering arbitral institution. Conflicts could develop regarding whether parties can be forced to comply with an institutional rule with which they disagree or that they excluded in their reference to arbitration. For example, institutional rules could mandate that all arbitrators be equally impartial, while the parties may want to have both a neutral arbitrator (who would be truly impartial) and party-designated arbitrators (who have an unstated mission of defending or representing the interests of the designating party in the arbitral deliberations).

Also, could the arbitrators ignore express contract provisions if all or a majority of them believed that to do so was necessary to the proper resolution of the matter or in the best interests of the process, or both? For instance, could they void a contract provision for extensive judicial review of the merits and replace it with an internal arbitral or more ordinary form of review? Additionally, could an administering institution (or, perhaps, a court) force an arbitral tribunal to hear and decide a matter which the tribunal believed was inarbitrable for reasons of the subject matter of the dispute or because of the inadequacy or limitations of the contract? Finally, should such matters be resolved solely within the arbitral process or should a court have the authority to resolve these conflicts when they arise or upon petition of one of the parties?

Currently, this type of conflict probably would be resolved by reference to a tried and true paradigm of basic principles. The latter have a type of theological standing in the current regulation of the process. First, the state's *laissez-faire* approach to arbitration at both the interna-

tional and domestic level provides for a practice of nearly complete arbitral self-regulation. Courts, therefore, would not be authorized to intervene except in specific and very narrow circumstances. Second, there is the strongly-held view in the current process that parties should trust the arbitrator to reach an appropriate decision in contested matters. This approach is often relied upon by the institutional administrators of the process. Accordingly, the arbitrators' exercise of benevolent, all-knowing discretion should resolve any and all conflicts. Third, the principle of party autonomy, which would in these circumstances encourage the parties to make detailed provisions in their agreement for this type of eventuality, could provide a solution.

The "basic principles" approach may no longer measure up to the sophistication of the process, the parties, and the emerging conflicts. The ideology of trusting the process and its adjudicators "to do the right thing" and the pragmatic pursuit of functionality may no longer be potent enough to regulate the power struggles that are likely to develop in the process. When arbitration was perceived primarily as a means of avoiding a dysfunctional judicial process at the international or domestic level, the trading-off of enormous authority and trust in the arbitrator for a workable process may have been a justifiable bargain. Now that complex matters, significant legal rights, and regulatory interests are implicated and the sources of authority are in potential conflict, the vying for strategic advantage should be decided by reference to or in accordance with a more formalized set of principles or procedures and perhaps by an external decision-maker. The prospect of discarding the basic approach of the past and the advantages and disadvantages of developing more juristic rule predicates must now be considered.

A DETAILED ILLUSTRATION

The circumstances of both international and domestic arbitration illustrate the increased likelihood that sovereign conflicts will emerge in the arbitral process and require a modification of the current framework and its practices. Using the facts of the landmark case, *Scherk v. Alberto-Culver*,²³¹ as a general model, and as a vehicle for responding to the problem being considered, assume that the parties to the sale and purchase of trademarks agree that all disputes are to be submitted to ICC arbitration and that the governing law shall be the UNIDROIT *Principles of International Commercial Contracts* (the "UNIDROIT" *Principles*).²³² A dispute arises and the parties proceed to arbitration. In deciding the

231. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974).

232. See UNIDROIT PRINCIPLES, *supra* note 160.

matter, the arbitrators, however, render a number of questionable rulings.

For example, the arbitral tribunal rules that the choice-of-law rules at the situs of the arbitral proceeding or that arise from the parties' nationality or residence provide for the application of a particular national law rather than the *UNIDROIT Principles*. The arbitrators further state in the award that, in their view, the result would be the same under either substantive vehicle, but that it is their preference to provide the parties with a legally correct application of the law in their ruling. Concomitantly or alternatively, the arbitral tribunal could conclude that the *UNIDROIT Principles* are inapplicable to the resolution of the dispute because they do not constitute law. Rather, they represent a mere statement or restatement of possible legal principles and are the product of the efforts of a non-legislative legal organization, the International Institute for the Unification of Private Law, a working group of which drafted the *UNIDROIT Principles*.²³³ The arbitrators, therefore, determine that the *UNIDROIT Principles* are not a proper law for purposes of an arbitral or any other form of adjudication. In a third variation, the arbitral tribunal rules that the *UNIDROIT Principles* is the law governing the merits. In ruling on a dispute, it applies Article 2.3 of the *UNIDROIT Principles* to the withdrawal of an offer, but it is clearly the wrong article given the facts. The tribunal should have applied Article 2.4 to the revocation of an offer.

In yet another variation, the tribunal could have simply misconstrued the content of the properly applicable provision. For example, the arbitrators may have misunderstood when an irrevocable offer becomes revocable under Article 2.3(2). Arbitrator error could also exist when the arbitrators correctly designate Article 2.4 as the applicable provision, but apply the civil law view of an offer's irrevocability as the primary rule rather than as the exception. The text of Article 2.4 clearly indicates that the opposite result should apply.²³⁴ The final, additional complication is that an objectively-ascertainable mistake of law may not make a difference in the result. For instance, it could be the case that, even if the arbitrators find the wrong party to be liable as a matter of law, contract defenses might preclude the imposition of liability. It is also possible that an "objective" error of law leads to the imposition of monetary liability on the wrong party.

The theology of the "basic principles" approach that governs the current process could provide the semblance of a response to the foregoing problems. Under contemporary ruling-making in the area, two inter-

233. *Id.*

234. *Id.*

related principles provide a type of solution: (1) highly limited judicial supervision of awards; and (2) giving absolute sovereign effect to arbitrator rulings. These rules constitute two sides of the same coin: judicial deference to and the hegemony of the arbitration process. Unless there is an unspeakably unfair maloccurrence in the process, the courts simply will ratify the arbitrators' determinations. After all, the parties bargained for arbitration and have received—as was their reasonable expectation—both the benefits and disadvantages of the process. The systemic interests of the process predominate over individual concerns so that the process may continue to fulfill its necessary role in the trans-border commercial community.

Moreover, several technical bases in present-day law could be used to address circumstances in which there is a disparity between party provision and arbitrator rulings. Whenever such a disparity allegedly exists, a party could invoke the ground of 'excess of arbitral authority' to challenge the arbitrators' determination and the enforceability of the award. A determination regarding whether the UNIDROIT *Principles* is the applicable law or constitutes a valid form of law could be deemed under Article V(1)(c) of the New York Arbitration Convention to be "matters beyond the scope of the submission to arbitration" or, less plausibly under Article V(1)(d), a facet of "[t]he composition of the arbitral authority or the arbitral procedure . . . not in accordance with the agreement of the parties" A court might also determine that an award containing such a ruling is "contrary to the [national] public policy" because the arbitrators' determination violates the rule of party autonomy. Similarly, under the FAA, vacatur of the award could be achieved under section 10(4) because arguably "the arbitrators exceeded their powers" in their ruling or on the basis of section 10(3) because the ruling constituted "misbehavior by which the rights" of the parties were "prejudiced."²³⁵

These technical dispositions are conceivable outcomes because they uphold the rule of contract in arbitration law. They also represent the use of court authority to contain the arbitrators' autonomy and the exercise of their adjudicatory discretion—a result that is much less palatable under current standards. Vacatur of an arbitral award for an objection to a choice-of-law ruling could readily be perceived as judicial interference with the arbitral process. Judicial activism of this sort has always been seen as antithetical to the interests of the arbitral process. Finally, even if the award were vacated for these reasons, the technical basis for the decision might not be stated or could be understated or

235. FAA, § 10(3).

camouflaged in the court opinion, making it difficult to establish precise lines of demarcation between the various actors in the process.

NEW RULE PREDICATES

Be that as it may, the time may be ripe—at both the transborder and domestic levels—to refine the basis for the exercise of judicial supervision in arbitration and to resolve by statute jurisdictional conflicts that are likely to emerge in the more developed process. Irreconcilable conflict between the sovereign parties can have a profound systemic impact upon the arbitral process and its operations. To some degree, the critical question is not whether new rules are necessary but, rather, how they are to be achieved. The statutory development of more complex rules and their judicial implementation may place an intolerable or crippling regulatory pressure on the process. The rules may be too cumbersome or may engender a highly complex form of litigation that will significantly compromise the autonomy and efficient operation of the process. Events may have simply outdistanced the utility of more efficient marketplace solutions. An authority mechanism needs to be devised, but its elaboration must respect the process as well as provide it with a solution to intractable conflict. A statutory revision seems to be in order, but that difficult undertaking is fraught with danger.

Initial questions relate to the scope of the contemplated statutory reform: should the entire statutory framework be revamped; is the revision of the provision for vacatur or confirmation of awards sufficient; or would adding a ground to that part of the statute be enough? Relatedly, what entity should be empowered by the statutory reform to apply the new standard and what powers should it be granted to accomplish its task? Other than creating a supranational agency operating through but beyond domestic processes or entering into a multilateral treaty, it seems that national courts are the best vehicle for resolving likely authority conflicts within the transborder arbitral process. The courts possess binding legal authority, even extraterritorial authority to some degree. They have no direct interest in the arbitral process, although they may harbor a view of its worth, mission, or function. They have a fiduciary obligation to safeguard the public interest. Proceedings are done in public and parties are treated in an even-handed and equal way. Generally, judgments are published or are otherwise accessible to a wider audience than the litigating parties. Leaving the resolution of authority conflicts to arbitral institutions, the arbitrators, or the parties would not be a feasible solution because of their involvement and interest in the process and because they can become enmeshed in the conflict.

If a court became implicated in a sovereign conflict—say, by com-

manding the arbitrators to rule on a matter they believed to be inarbitrable—the court in conflict should be disqualified from resolving the conflicts. In these circumstances, a neutral court might be sought, but a reference to a court within the same national system might not be viewed as neutral. Affording jurisdiction to another, nonconflicted arbitral actor would result in the loss of all the advantages associated with the judicial decision-making process. Referring the conflict to a second, appellate-type arbitral tribunal might provide the necessary recourse. Here again, the lack of public authority—despite would-be neutrality—could be a fatal flaw. It seems that such conflicts should be referred to a judicial tribunal, but one that is disinterested and manifestly impartial.

A record pertaining to the dispute that describes the parties involved, the relevant facts, and the issue itself is necessary to make the new type of judicial function possible. This would require—as a general practice—some documentary work on the part of arbitral institutions and tribunals. At a minimum, arbitrators would be required to render a detailed reasoning with awards, *i.e.*, the award should supply the court with a reasonably thorough statement of the facts of the case, a description of the issues submitted to arbitration, a summary of the parties' positions on these issues, and, finally, the arbitral tribunal's determination and the justification for the result in terms of applicable law. This practice would formalize the process and give it a bureaucratic character that it currently does not possess. Time and resources would need to be dedicated to this activity. Presumably, the writing of the award would not be subject to adversarial argument.

In an indirect way, the present-day process imposes a similar requirement whenever a party challenges the enforceability of an arbitral award before a court. In order for the requested court to perform its task of vacating or confirming an award, a party's adversarial opposition to the award generally yields a relatively comprehensive account of the arbitral proceeding and of the basis for the arbitrators' rulings. In a word, the filing of a motion to vacate the award usually forces the court to reconstruct the arbitral proceedings. Much of the arbitration gets rehearsed before the court and the parties ordinarily debate the rectitude of the arbitrators' determinations. The current approach not only reduces or eliminates the confidentiality associated with arbitral proceedings, but it also permits a type of "non-merits" review of the merits of the litigation. The losing party, in effect, invites the court to participate as a referee in its challenge of the arbitrators' determination. Although most of these proceedings result in the enforcement of the award, the very act of bringing of this type of action has a negative impact upon the autonomy and independence of the arbitral process.

Questions regarding the implementation of the new procedure abound. In particular, if adopted, should it be formalized in statutory language and become part of the standard basis for review? In other words, should it be a rule of arbitration law that arbitrators provide a reasonably comprehensive record of the arbitration in the award sufficient to allow a court to assess and rule upon possible authority conflicts in the process? Presumably, the documentation could not be used for other disputes. Must the parties provide for this requirement in their arbitration agreement or would the requirement be stated or implied at law? In the latter case, what result if the parties provided to the contrary in their agreement or during the proceeding? What if the parties stipulated in the arbitral clause that none of the arbitrators' rulings on law or legal matters could be subject to judicial review? When the authority conflict involves the application of law, would judicial resolution of the conflict be unavailable? Should it be difficult to constitute a cause of action on this basis? Should courts be invested with substantial power to resolve such conflicts? Should sanctions be imposed if there is party abuse of the ground on which the case is brought? What might constitute such abuse and what is an appropriate penalty?

Assume that courts conduct the evaluation and that they are supplied with an adequate record upon which to pursue their supervision, on what substantive rule basis do they base their supervisory activity? What are the ground rules for the heightened level of judicial involvement? Are arbitrators always expected to follow the letter of the parties' agreement? Can the arbitrators reverse or ignore a particular facet of the parties' agreement as long as they respect the provision for arbitration and the application of law to the merits of the dispute? As noted in the description of the potential conflicts, what outcome if the arbitrators rule that the parties' choice-of-law is not a choice-of-law at all? The *UNIDROIT Principles* are not enacted law in the traditional sense. Do the arbitrators have a right to police the arbitration agreement in this fashion? Although the reference to arbitration remains intact and is not voided by a would-be erroneous choice-of-law, do the arbitrators have the adjudicatory right to select what they believe to be a "real" law as the law governing the resolution of the dispute? It could be argued that the arbitrators' authority to so rule does not necessarily arise, strictly speaking, from submission to arbitration. Their ruling does not relate to a dispute between the parties. Rather, it emanates from the designation of the arbitrators as arbitrators and from their inherent authority, implied in that designation, to manage and conduct the arbitral proceedings.

The arbitrators' application of the law chosen by the parties, but their failure either to apply the right provision or to construe it correctly,

raises a different set of problems relating to judicial supervision and vacatur. In these circumstances, the wills of sovereign actors do not clash, but rather the arbitrators arguably implemented the parties' directive incompetently or negligently. Unless legal rectitude becomes a critical factor in the enforcement of arbitral awards or the parties demand the correct application of law in their agreement, errors of law should not ordinarily result in the vacatur of awards. The exercise of judicial supervision on this basis would not address fundamental systemic conflicts within the process but, instead, would be used to validate and impose an agreed-upon, customized structure on the standard arbitral format. The use of judicial authority in this way should be left to party agreement and the court's discretion.

There is, therefore, a subject matter limit to the contemplated basis for judicial review. The projected ground is intended exclusively to provide a means by which to address conflicts of authority among the significant actors of the arbitral process. These conflicts seem—at least initially—to be irreducible because they involve actors who have an equally strong stake and position in the process. The court—an external, non-participating entity—is being asked to privilege one actor's position and interests to the detriment of the other parties. Each competing actor has a basis for the assertion of its authority: the parties ground their authority in contract, and the arbitrators have the authority and responsibility to manage the proceedings and reach a determination on the merits. The arbitral institution that is designated in the agreement is invested with the authority to administer the arbitration under its or other rules. To some degree, once the parties invoke the arbitration process through the designated institution and nominate arbitrators, they have relinquished some of their founding authority and have made themselves subservient to the authority of the other actors in the process. The danger in having recourse to judicial supervision to resolve these conflicts of authority is that the supervision may become too aggressive a form of policing awards or may generally, by its mere exercise, undermine the arbitral process.

CODIFYING THE NEW RULES

A possible statutory provision relating to the foregoing discussion might read:

An international arbitral award can be denied recognition and/or enforcement in the requested jurisdiction if the reviewing court determines, upon an inspection of the terms of the award and the allegations of the party challenging the enforcement of the award, that the arbitrators failed to follow or observe a material part or provision of

the arbitration agreement relating to choice-of-law, damages, or the agreement's scope of application. A material deviation from the express content of the arbitration agreement can lead to the nullity of the eventual arbitral award, unless it is likely that the arbitrator departed from the terms of the agreement to uphold the functionality or the best interests of the particular arbitration and of the arbitration process generally.

To make judicial supervision possible on this basis, arbitrators are expected to provide a comprehensive description of the matters submitted, the parties' positions, the applicable provisions of the governing law, and the relief that was ordered. In particular, arbitrators should address and explain circumstances in which their rulings or decisional methods clearly depart from the express terms of the arbitration agreement. A failure to do so could undermine the enforceability of the award and would entitle a court to reprimand an arbitrator verbally in its opinion.

The court's inquiry in this and other matters must be confined to the contents of the award and the parties' respective summary allegations. In deciding such matters, the requested court should recognize that the contracting parties have exercised their contractual right to redress their grievances through arbitration, but that the arbitrators bear the responsibility for making the arbitral process work. While the parties' agreement makes law in the process and can dictate its operation to a considerable degree, it should be presumed—as a matter of law—that the parties have not bargained for a dysfunctional or pathological arbitration or to prevent the arbitrators from exercising any adjudicatory discretion whatsoever.

Therefore, when the arbitrators issue a substantive or procedural ruling that clearly deviates from the parties' agreement in order to foster the operation of the arbitration, the award cannot be vacated or nullified on that basis. It is only when the deviation is based upon a difference of professional opinion, choice, or mere convenience that it becomes actionable as a ground for opposing the enforcement of the award. Errors of law are not a basis for nonenforcement or vacatur, regardless of whether they are evident, subtle, or a possible matter of opinion, because legal exactitude is not ordinarily a material basis for the bargain to arbitrate. The parties, however, are free to provide otherwise.

Accordingly, a requested court with proper jurisdiction over the subject matter and the parties can deny recognition and enforcement to an international arbitral award if: (1) upon an examination of the award and a consideration of the parties' allegations, it is evident that the arbitrators failed to follow a material term of the parties' arbitration agreement and it does not appear from the facts and circumstances that such

deviation was necessary to the proper operation of the arbitral process; (2) illicit payments of money or the giving of gifts have been made to the arbitrators or administrators or favors have been performed for them with a view toward influencing the process and the eventual result (participation in bribery and other forms of corruption can lead to the imposition of civil and criminal sanctions by courts upon the offending parties, including the arbitrators whose immunity should not cover matters of corruption); (3) for reasons of self-interest, business interest, religious, professional, cultural, or personal bias, the arbitrator(s) could not exercise independent judgment in reviewing the facts, the position of the parties, or the law, and did not rule impartially in the matter (in applying this ground for judicial supervision of awards, a reasonable attempt by the arbitrator to discover possible conflicts should act as a defense to the inadvertent failure to disclose relevant information because prospective arbitrators are required to act as a reasonable professional person would act in these matters, and a deliberate failure to disclose relevant and accessible information by arbitrators constitutes an attempt to corrupt the process and can expose such arbitrators to disciplinary and monetary sanctions as may be ordered or recommended by the requested court); (4) there was a failure of basic notice of the proceeding and/or the procedure did not provide a meaningful opportunity to be heard and to present one's case, or one of the parties was subjected to an alien legal proceeding or procedure that prejudiced its rights and/or had a bearing upon the outcome of the adjudication; or (5) the award or procedure leading to the award violates a fundamental rule of international public policy such that the enforcement of the award would amount to a denial of justice.

International arbitral awards cannot be denied recognition or enforcement, nullified, or vacated because they contain would-be identifiable errors of law. Mistakes as to the applicable text, or the interpretation of applicable texts, or as to rules or principles do not constitute a proper legal basis for voiding an award. Inarbitrability of the subject matter of a dispute can act as a defense to enforcement only if it is recognized as such a basis in an international convention or instrument that governs the matter of enforcement.

The foregoing provision attempts to provide codified language that addresses the issues that surfaced in the discussion regarding an appropriate rule predicate. The objective of the recommended rule is to invoke judicial supervision only for incidents that involve a core or fundamental breach of the agreement for arbitration. Nevertheless, the restrictiveness of the scope of review coincides with meaningful review and vacatur for conduct or rulings deemed to be impermissible or unac-

ceptable. It represents an effort to strike a sensible balance between the nullity of awards, party authority to make law in arbitration, and arbitrator discretion within the process. In this regard, the controlling principle is that party recourse to arbitration could not have been a decision to participate in a dysfunctional form or application of arbitration. Finally, the grounds for nonenforcement take into account contemporary concern for arbitrator disclosure and impartiality, and eliminate arbitrator immunity in the event of corruption. The latter is a novel recommendation that is likely to be controversial, but it introduces a measure of arbitrator accountability into the process. The grounds also emphasize a need for basic due process and compliance with international public policy; a less rigorous and more narrowly-drawn version of its domestic counterpart.

Rule indeterminacy is hardly a novel phenomenon in legal doctrine. It certainly is not exclusively characteristic of arbitration. Courts resolve many of the issues that arise in litigation by reference (overt or implicit) to general formulae that they apply to the facts of the case at their discretion. The question that arises for the law of arbitration is the degree of rule indeterminacy in relation to the issues and circumstances that surface in contemporary arbitrations. Simply stated, the focus of the rules upon a singular policy and the concomitant superficiality of their content have not allowed them to keep up with the growing range of arbitration's scope of application. The current rules do not adequately clothe the developing body of circumstances in contemporary arbitration. There is a real danger of dysfunctionality and imbalance between the legislative authority of rule propositions and the exercise of court authority in individual cases. The new rules cannot be expected to resolve fully intractable problems (like sovereign immunity), but it is reasonable to expect that they will respond sufficiently to the complexity of the controversies and provide a basis for the rational accommodation of conflicting interests in a suitably civilized doctrinal framework.

CONCLUSIONS

The story of ICA (and that of its domestic analogue) could not have been imagined by the most inventive *raconteur*. In many respects, the saga of arbitration challenges believability. It is a narrative filled with the jubilation of success and heroic deeds. Prescient characters struggle against what appear to be immovable forces and insurmountable obstacles to prosper and fulfill their destinies. Not only does reality outdo fantasy, but also the "inglorious" commercial ethos triumphs over the rhetorical flourish (and falsehood) of political debate. Stability and actual accomplishment outdistance the empty dialogue of opposing ideological convictions.

As the structure of the preceding text reveals, the ballad of arbitration can be told in crafted and measured segments—self-contained episodes that are suitable for communication in an oral tradition. The rise of ICA has clear epic dimensions that warrant being recited as testimony to the exploits of the international business community. The inaugural days, however, appear to be at their conclusion. A new era for ICA and arbitration in general is dawning. It builds upon, but transcends, the dimensions of the oral tradition. The exuberance of epic symbolism must now yield to the linearity of an analytical narrative. The text, like its subject matter, must be altered. The acquisition of civilization establishes a different reality, role, and expressive discourse for the process.

Conflicts are likely to arise among the sovereign actors who participate in the process. These conflicts will challenge the basic principle of authority within the process. The adages of the past seem to provide an inadequate basis for resolving these conflicts. Rules must become more demanding in content, and courts need to be relied upon to demarcate the boundaries of permissible conduct within the process. Sovereign clashes cannot result in intractable conflict but, rather, must yield to the balance of competing interests. Beyond the development of new rule predicates, there is an additional emerging problem for arbitration.

Arbitration, in either its international or domestic form, does not square well with the basic attributes of democracy. In particular, the use of adhesion contracts in domestic employment and consumer arbitration hardly coincides with the principle of individual freedom, no matter how the courts attempt to redeem these involuntary compacts. The confidentiality of the proceedings and results, the costs of the process, the repeat player phenomenon, and the lack of reference to a controlling community standard all make recourse to domestic arbitration an antidemocratic exercise. The oppression of the weaker party by the agreement and procedure, and the concomitant skirting of basic rights and remedies (like juries, class actions, punitive damages, and civil rights) does not square with the democratic ethos embedded in the Bill of Rights. In fact, this type of remedial restriction is especially harsh on minority groups and the protection of their rights. This state of affairs was created, moreover, by the United States Supreme Court in its decisional law, *i.e.*, by the branch of government that is not elected or subject to the public will and which is most marked by an elitist tradition.

Domestic arbitration and its variegated practices and characteristics are profoundly contrary to the democratic values that the American political tradition treasures. Nevertheless, it has not been the subject of critical outrage or the target of media outcries. Congressional opposition is so weak and now so formalistic that it can barely be measured. In

fact, congressional passivity appears to be masquerading as the “safe” equivalent of endorsement.²³⁶ It seems that all parties accept the Court’s view that the management of limited judicial and adjudicatory resources requires forced recourse to arbitration for the resolution of civil disputes.²³⁷ The inaccessibility of courts makes arbitration necessary if some measure of justice is to remain accessible to ordinary citizens. Therefore, recourse to arbitration—no matter how it is achieved—is always, as a matter of law, in the best interests of all parties. Commentators, other courts, media outlets—in effect, everyone—accepts the Court’s pragmatism and practical disposition. The elite decision-making is not protested. There are no shrieks denouncing antidemocratic behavior.

Instead, media complaints²³⁸ about arbitration have been directed to ICA, especially the binational panels under NAFTA. In one decision and in several pending cases, the arbitrators who sit on the NAFTA panels have been asked to rule upon the lawfulness of domestic enactments that allegedly curtail the business interests of foreign companies incorporated in one of the member states. NAFTA arbitrators apparently have ruled, in the *Methanex* case,²³⁹ that a California legislative enactment banning the sale of a particular chemical ingredient within the state and manufactured by Methanex amounted to the expropriation of the company’s property because of the loss of projected business opportunities. As a result, California may owe the Canadian company hundreds of millions of dollars in compensation for the confiscation of its would-be business advantage and potential.

Thereupon, several media “personalities” launched into a diatribe against NAFTA and its Chapter 11 procedures. The attack was expressed through both the written and televised media.²⁴⁰ It centered upon NAFTA’s alleged lack of respect for and apparent annihilation of domestic United States democratic values. According to the journalists,

236. See *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 272 (1995).

237. *Id.*

238. See *Now With Bill Moyers* (PBS television broadcast, Feb. 2002). Moyers described his program with the title and pun “Trading Democracy”; he interviewed a fellow journalist who writes for *The Nation* (William Griedler) and who was single-mindedly critical of the NAFTA dispute resolution mechanisms and an academic writer (Barber or Barbier) who expressed sympathy for the protests against the World Bank and the IMF. Notes pertaining to the programs are on file with the author.

239. See *Methanex Corp. v. United States*, 13 WORLD ARB. & MED. REP. 68 (2002). But see *Canadian Court Sets Aside a Portion of a \$16.7 Million Award in First Judicial Appeal of NAFTA Award*, 12 WORLD ARB. & MED. REP. 275 (2001) (the Government of Mexico applied to the Supreme Court of British Columbia to set aside the NAFTA award; the court ruled, in the first judicial appeal of a NAFTA award, that the arbitrator made decisions beyond the scope of the submission to arbitration, thereby rendering portions of the award inappropriate).

240. See *supra* note 238 and accompanying text.

NAFTA and its dispute resolution process arose from a conspiracy among specialized international lawyers bent exclusively upon furthering the interests of their multinational corporate clients. It appeared to amaze the journalistic observers that NAFTA arbitrators were a select group of specialists who decided the issues of trade litigation in nonpublic, confidential proceedings. They expressed utter incredulity that an agreed-upon, state-sanctioned transborder adjudicatory mechanism, the decision-makers of which are appointed by the member states, could hold a state legislative provision violative of international commercial norms. Because determinations were not made in a town-meeting setting and had not been reached by the members of a jury, they simply could not be correct. The Founding Fathers would not approve of this ominous "court for capital." The corrupt and greedy capitalists had bought their own international justice which allowed them to subvert domestic law and domestic political restraints through non-American processes.

This assessment of NAFTA and ICA, in effect, amounted to misrepresentations pitched at a level of deceit. Nothing was ever said—and, therefore, understood—about the larger operation and aspirations of NAFTA. The critics never bothered to communicate an understanding of the difficulty of international adjudication or of how instrumental a functional system of adjudication is to the pursuit of international trade. Without the system of bi-national panels, trade problems among neighboring states could result in the erection of protectionist barriers and the eventual conduct of highly destructive trade wars. NAFTA allows its member states to compete more effectively with the European Union and, as noted earlier, its dispute resolution mechanism includes the possibility of having individuals arbitrate directly with foreign states the impact of governmental trade policy upon private commercial transactions. Domestic sovereign policy must yield in the international arena to the dictates of agreed-upon transborder commercial regulation. Unilateralism, parochialism, nationalism, and state irresponsibility no longer can be practiced by member states in the NAFTA setting. Presumably, the violative state conduct can remain operative within the state's territory as long as the state pays for the damage the enactment or policy causes to the process of unencumbered trade. Sovereignty can no longer be a cloak under which the selfish misdeeds of the state are sheltered. In the transborder trade context, states are fully accountable for their conduct, even their regulatory conduct, when sovereignty falsifies the unimpeded exchange of goods and services. The accountability of state governments for the impact of their conduct upon international trade is nothing less than an enabling revolution for the advocates of international unity, harmony, and progress.

Reasonable minds can differ on the sagacity of the bi-national panel's particular decision regarding expropriation. It may be an excessive principle of accountability; it may reflect a logical conclusion uninformed by the necessary experience; or it may be limited to application in a single case. Arbitrator lists could be amended to include individuals with a less commercial bent or with experience in both the political and commercial sectors. Subsequent decisions may reject the determination completely or may provide modifications or narrow its import. Domestic trial systems also generate mistaken notions of lawful behavior. "Separate-but-equal," a legal doctrine that institutionalized racism as a legal form of social organization, resulted from a highly democratic system in which the legal process served to protect individuals from the tyranny of the state or of the majority will. The system eventually corrected the aberration. It also could be the case that the arbitrators on the bi-national panel are correct or trying to make a point concerning the system of relationships within NAFTA.

It is, quite frankly, absurd to condemn NAFTA and international adjudication on the basis of the journalistic perception of the process. This view is as misguided and ill-conceived as the chants of the socially and psychologically disaffected demonstrators who appear on the streets to protest World Bank and IMF meetings. It is simply a false proposition to assess the legitimacy of the practices and institutions of international adjudication by reference to domestic democratic values. As noted earlier, democracy and transborder processes of law are like oil and water; they simply do not inform or elucidate each other. Domestic values and institutions may leave an imprint upon transborder entities and mechanisms, but the latter function largely upon their own dynamic and for their own purposes. The goal is not to achieve equality, freedom, or the protection of minoritarian interests within a system of majority rule. Rather, it is to establish a workable rule of law in which the diversity of the constituent community can be sublimated and productive relationships can be achieved in a system of agreed-upon rules. In this setting, the Jefferson who was Secretary of State and Ambassador to France is the relevant frame of reference or model. Expertise, sophistication, exposure, tolerance of differences, an ability to articulate a neutral standard and espouse a transcending approach are all factors that are at a premium.

It is a serious mistake to assess transborder adjudicatory frameworks through myopic domestic eyes. It is equally flawed, even in the aftermath of Enron, to castigate corporate enterprises for attempting to facilitate their profit-making goals at an international level. Making money is not a criminal act nor does it imply corruption. Rather, the real

mistake and danger is to turn a blind eye to the challenge that domestic arbitration presents to democracy and democratic values. It is in that sector that patent unfairness and overreaching for questionable, perhaps illicit, corporate purposes are taking place. It is unfortunate that arbitration is used in this fashion by corporate actors and that courts affirm this exploitation of the remedy.²⁴¹ Despite its practical utility, arbitration done in this manner signals the eventual demise of the Bill of Rights and the redefinition of American citizenship within the United States.²⁴²

241. See Thomas E. Carbonneau, *Beyond Trilogies: A New Bill of Rights and Law Practice Through the Contract of Arbitration*, 6 AM. REV. INT'L ARB. 1 (1995).

242. *Id.*

